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# Does American Indian Law Reflect Indian Values?

## A Study on Native American Identity

MONICA VLAD

"The right of aboriginal peoples like the Native Americans or the Maori in New Zealand eroded with time, not because the wrong done to them is wiped out (it may well grow greater, with increasingly deleterious effects on their communal life) but because the possibility no longer exists for the restoration of anything remotely resembling their former independence."

Michael WALZER<sup>1</sup>

### GENERAL CONSIDERATIONS ABOUT NATIVE AMERICAN IDENTITY. THE PROBLEM OF DEFINITION.

Such subject – if an insight into its whole complexity is truly ever possible – involves a sense of perplexity about the human race itself. The use of philosophical terms would express the idea of Native American Identity more successfully, given the limits imposed on value judgements by the legal language.

If one goes back to Michael Walzer's statement, one might find that the comparison between indigenous peoples and endangered species is not that out of place. This approach of sacred respect for the (still unknown)<sup>2</sup> researched aspects might bring us closer to an appropriate view about the first peoples' lives, as the science of anthropology teaches us<sup>3</sup>.

In describing and analyzing aspects of indigenous peoples' identity, one has to cope with a constant difficulty. Many of them might escape from our capacity to rationalize, starting with their understanding about life itself.

I feel myself far from understanding this fundamental fascination, living in a time in which "traditional Indians have tended to prostitute their own knowledge by making it available to the wandering scholar, the excited groupie, and the curious filmmaker and writer"<sup>4</sup>. If one thinks over the sadness of this remark, one

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<sup>1</sup> "The New Tribalism", in O. DAHBOUR, M. ISHAV (eds.), *The Nationalism Reader*, Humanities Press, New Jersey, 1997, p. 326.

<sup>2</sup> When writing this, I have at least two aspects in mind: one is the problem of *access* to this type of knowledge; the other derives from it and cannot be said clearer than in the words of Bobby Billie (Independent Traditional Seminole Nation): "Other cultures can explain; but we have to keep everything for ourselves". (See Bobby Billie's talk at the Miami University Law School conference on "Sacred Sites and Modern Lives", February 2000).

<sup>3</sup> An insight on this fascination can be found in the book of Julian BURGER, *The Gaia Atlas of First Peoples*, Anchor, London, 1990.

<sup>4</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within. The Past and Future of American Indian Sovereignty*, University of Texas Press, Austin, 1998, p. 254.

might conclude that the chance for American Indian cultural integrity today is highly at risk. "Living culture" is so much part of a people that it is "virtually incapable of recognition and formal academic transmission"<sup>1</sup>. Such statements are true especially for a civilization like the Indian one, probably apocryphal to our understanding even today.

There is a deep truth in this statement, and further reflection might stop the initiative to explore this complexity.

But one could choose to accept that essays like this one may, at least, illuminate further questions. It is due to the 1972 *Indian Education Act* and to its provisions for teaching Indian culture and history, but in particular to the access to this area of law (since it is taught at American University, Washington College of Law during the 1998-1999 academic year, for which I prepare this study) that I had the chance to come closer to this research topic. From this point of view, the goal of this paper is to (hopefully) escape from the risk of reducing tribal culture to a "text-book phenomena".

This adds tremendous need for an interdisciplinary perspective on the issues described. Among these, the interference of law with other normative disciplines, but also with descriptive and explanatory ones (history, anthropology, political science) has to be considered in the first place. Such approach is necessary in order to gain a minimum of understanding of the many issues concerned, since "no area of federal law is more complicated or requires more expertise than federal Indian law"<sup>2</sup>. This is true not only because of the hundreds of treaties, thousands of statutes, and hundreds of thousands of administrating rulings and actions that are involved in federal Indian law, nor only because of the over six hundred separate Indian communities that are dependent in some manner on the vagaries of interpretation of federal Indian law or the "literally billions of dollars and the lives of over a million people" that are at stake in Indian cases<sup>3</sup>, but it is merely true because, every time when Indian issues are involved, one has to bear in mind that a different, still unknown civilization is involved, for which rights are tools of cultural survival.

Such complexity makes us aware of the necessity to convert the language of our understanding in order to make it more receptive to the – for us – still undiscovered world of Indian civilization. If it is true that "no nation has ever imposed the moral demands on itself that America has", and if "no country has so tormented itself over the gap between its moral values, which are by definition absolute, and the imperfection inherent in the concrete situations to which they must be applied"<sup>4</sup>, then America really has to see in the federal policy towards the Indians (and in the legal cases that accompanied this policy over time) the degree of tolerance the American legal system was/is capable of.

Intolerance was defined by Hannah Arendt as the incapacity to accept the difference as such (and I can hardly think of a more complex definition). Within this framework, possible answers to the so different values that are involved while dealing with Indian issues can be found if one analyzes the evolution of the legal system with regard to the Indians, meanwhile commenting on their long-run implications. At least two aspects complicate such investigation: the values of

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<sup>1</sup> *Ibidem*, p. 250.

<sup>2</sup> *Ibidem*, p. 265.

<sup>3</sup> *Ibidem*.

<sup>4</sup> Henry KISSINGER, *Diplomacy*, Simon & Schuster, New York, 1994, p. 23.

colonial and federalist America, as defined by herself, and the very little insight into the Indian's civilization that accompanied this process<sup>1</sup>.

The starting point of this analysis is inspired by Thomas Berger's simple remark: "Make no mistake", he writes in his "Epilogue" to *"A Long and Terrible Shadow. White Values, Native Rights in the Americas"*, "they (the American Indians) are people of our time"<sup>2</sup>. Nonetheless, judgments that have been made about certain Indian communities at a specific moment in time have often been extended or generalized for other periods of time and have been applied to different Indian communities, and today it is hard, if not impossible, to find an answer to the concern whether "it could have been different, if...". With this in mind, two questions arise:

Yes, they are people of our time – but how can we deal with the obvious reality that, today, they are strangers in their own land? And, more fundamentally, how we can deal with the implications of an older dilemma: by what right does one race impose its laws and institutions upon another?

A tentative answer first has to seek a distinction between this question as a trauma caused by the perpetual and general problem of domination in human history, and by its implications for a particular situation of indigenous peoples. As to the later, the initial question is doubled by an issue that comes closer to American Indian identity: How does one people, one race, justify the taking of the lands of another people, another race?<sup>3</sup>

Today, one is aware that the Indians' rights have been eroded in time to such an extent, that ideas like "restoration of tribal authority" (a concept that is unavoidably linked to the land) sound like an abstract speculation, rather than like a serious matter. But this is only one side of a complex problem. The approach towards difference has perhaps hardly changed today. One has to go no further than considering the "disconcerting reaction the average American on vacation out west" has, while suddenly encountering a sign, that proclaims that the highway is entering "an Indian nation"<sup>4</sup>. For the American (self-regarding) understanding, "nations" are "preferably an ocean away", for all the hustle of modern and institutional life. The average American will most probably not be aware of how dramatically institutions shape human personality – here included the approach towards education and the access to knowledge generally. Moreover, the chance for a real understanding is diminished by the very fact that today American ethnic groups generally face a crisis of authenticity, in the sense that cultural patterns, once rooted in the exigencies of life, appear to be dysfunctional: ethnicity becomes symbolic, and thus culturally thin<sup>5</sup>. Unlike "other American ethnic groups"<sup>6</sup>, Indians have

<sup>1</sup> It has been argued – at least with regard to Indian law before discovery – that the mainly oral character of Indian customs made them difficult to know. Such perspective does not go beyond Euro-centric assumptions.

<sup>2</sup> Thomas BERGER, *A Long and Terrible Shadow. White Values, Native Rights in the Americas*, University of Washington Press, Seattle, 1992, p. 160.

<sup>3</sup> This is, unfortunately such a severe moral question, that it remains unanswered today.

<sup>4</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 1.

<sup>5</sup> In his writings, Charles Taylor has addressed the question of "multiculturalism" in western societies in an exhaustive manner. I do believe that these types of societies do not know what they deal with while addressing the demands of "multi-ethnicity". Assimilation by the dominant knowledge system leads to the same sort of homogeneity as monoculturalization, but it does so in a different way.

<sup>6</sup> Before further description, it is vital to underline here how important terminology is. There always is a conceptual meaning beyond semantics, and "ethnic terminology" is especially a

preserved the idea of nationhood throughout their period of contact with the non-Indian world but have had great difficulty communicating the essence of what they believe to the larger society. It has, therefore, been comfortable to consider the Indians' perception about themselves as nations nothing more than "some primitive delusion of grandeur that has certainly been erased by history"<sup>1</sup>.

Perhaps no other political relationship in the world reveals the fact, that modern social reality and historical political reality are rarely consonant as much as the "Indian tribes-federal government" relationship does. American Indians are unique in the world in that they "represent the only aboriginal peoples still practicing a form of self-government in the midst of a wholly new and modern civilization that has been transported to their lands"<sup>2</sup>. But this very reality has forced the Indians to confront sacredness and utility<sup>3</sup>. With the little insight into the authentic Indian world that is possible today, non-Indians can hardly understand the Indian notion of "sacredness". As to their understanding about "utility", this has to be perceived within the paradoxical language of a tragedy: the trade with traditions and values, for the sake of survival, that goes back to the treaties between the federal government and the tribes.

Since today there are many differences in the Indian world, there is a risk of overgeneralization that can hardly be avoided. There are landed and landless tribes, large and small tribes, eastern and western tribes, "federally recognized" and "non-federally recognized" and terminated tribes, reservation and urban Indians, "traditional" and "more modern" Indians. But the confrontation of these opposite concepts within the tribal psyche is characteristic for all, and it is perhaps eased only by the Indians' perception about time: "religious gifts of power seem not to be eternal but only used within this particular fragment of cosmic time", and "ancient teachings inform Indians that the true mark of a civilization is its ability to live in a location with a minimum disruption of its features"<sup>4</sup>. How dramatic

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"complex and sensitive matter". It has been argued that "American Indian" is a European denomination and Indians on the reservations most often refer to Native people in general as "Indians". However, the terms "Indian", "American Indian" and "Native American" are all widely used by both Indian and non-Indian scholars, as are some less common terms, such as "Amerindian", "aboriginal Americans" and "Natives" (the latter being generally used to refer to indigenous Alaskan groups such as Inuits or Aleuts in both the United States and Canada). As Robert White wrote in 1990, it seems that the Native Americans "perhaps feel that a misnomer applied to their ancestors more than five hundred years ago by an Italian adventurer is the least of their concerns". Still, it is pertinent to quote here that "the false terminology used against us (the American Indians) is so pervasive that any of its words call up the (false) idea of 'Indian-ness'". The word 'tribe' comes from the three peoples who originally founded Rome ('Tribunal', based on the number three, comes from the same root). It is not a descriptive word, nor a scientific one. Its use in anthropology has been completely discredited, and came from the European concept of human progress at the pinnacle of which were the capitals of Europe. "Tribe", "chief", and similar words do not describe a part of reality for any people. They are descriptive only within the discourse of enclosure and concealment, for purposes of fabricating impressions of relative primitiveness. See Jimmie DURHAM, "Cowboys and ... Notes on Art, Literature and American Indians in the Modern American Mind", in M. Annette JAIMES (ed.), *The State of Native America*, Beacon Press, Boston, 1992, p. 433.

<sup>1</sup> *Ibidem*, p. 1.

<sup>2</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 2.

<sup>3</sup> Such association must seem grotesque to the Native Americans, if not impossible.

<sup>4</sup> *Ibidem*, p. 1.

this confrontation was and still is for the Indian communities is revealed by the difference between Indian civilization, on one hand, and the European-American civilization that has imposed its values on the former.

The irremediable effects of this process of imposition cannot be described, in any case not in a scientific paper<sup>1</sup>. Still, a scientific paper has to mention at least the most significant aspects of this ongoing phenomenon.

This means to mention, in the first place, that for indigenous peoples knowing means valuing. On the other hand, the assumption, that knowledge is "value free" makes the substance of the "melting pot" concept (a notion which is, itself, a constitutive myth of the United States)<sup>2</sup>. But it is essential to note here that respect is a cognitive virtue, and that there can be no respect where there is no understanding<sup>3</sup>. Also, the instrumental reduction of what is intrinsically valuable lies at the heart of disrespect. This particularly applies here to the situation of indigenous peoples of the Western hemisphere<sup>4</sup>. If we can ignore that "sacredness goes out of everything", that one "cannot take life without a reciprocal offering", then the "imperialist pretension to universality made on behalf of the Western knowledge system and the total inability of its adherents to regard competing systems with anything but contempt"<sup>5</sup> invades in our lives.

Moreover, a most wide-spread and current phenomenon can be best described in Renato Rosaldo's words:

"The agents of colonialism yearn for what they themselves have altered or transformed. This 'nostalgia' has a paradoxical element to it: someone deliberately alters a form of life, and then regrets that things have not remained as they were prior to the intervention. At one remove, people destroy their environment, and then they worship nature. In any of its versions, imperialist nostalgia uses a pose of 'innocent yearning' both to capture people's imagination and to conceal its complicity with often brutal domination"<sup>6</sup>.

Meanwhile, within the "Other's" world, the purpose of the Indian way of knowing was to keep whole things whole, "because only when they are whole is the living presence, the soul or spirit, really there"<sup>7</sup>.

Unavoidably, the analysis brings us back to the times of European discovery and conquest. Further considerations will describe the social and legal issues related to this aspect.

<sup>1</sup> This would be similar to pretending that a tragedy could be understood if expressed in a manner different than an artist would choose.

<sup>2</sup> See Siegfried WIESNER, "¡Esa India! Latcrit Theory and the Place of Indigenous Peoples within Latina/o Communities", *University of Miami Law Review*, vol. 53, no. 4, July 1999, p. 836.

<sup>3</sup> Laurie Anne WHITT, "Indigenous Peoples and the Cultural Politics of Knowledge", in Michael K. GREEN (ed.), *Issues in Native American Cultural Identity*, Peter Lang, New York, 1995, p. 241.

<sup>4</sup> Although my article is limited to exploring the situation of Native Americans in the United States.

<sup>5</sup> Laurie Anne WHITT, "Indigenous Peoples...cit.", p. 236.

<sup>6</sup> See Renato ROSALDO, *Culture and Truth: The Remaking of Social Analysis*, Beacon Press, Boston, 1989, p. 70.

<sup>7</sup> *Ibidem*, p. 249.



## ATTEMPT AT AN INSIGHT INTO INDIAN'S PERCEPTIONS ABOUT SOCIETY AND LAW

"There was never a draft in Indian society"

Vine DELORIA

It is obvious that first contacts with Europeans shocked both the Indians and the explorers. If one considers the Indian nicknames for whites – "people who take orders" or "people who march in a straight line" – one might have an insight into the powerful difference between the two confronted worlds. To the Indians, it seemed that the "whites" had surrendered "all morals substance in exchange for security in the anonymity of institutional life"<sup>1</sup>.

One can perceive this fundamental difference by first looking at the idea about "people" in Indian society. For the Indian communities, the "people" is primarily a religious conception, and it begins somewhere in the primordial mists. Tribal names reflect the belief that these particular peoples have been chosen from among various peoples of the universe (including mammals, birds and reptiles) to hold "a special relationship" with the higher powers. Thus most tribal names can be interpreted simply to mean "the people".

Given the Indians' perception about cosmic harmony, the tribes understood their place in the universe as one given specifically to them<sup>2</sup>. Therefore they had no need to evolve special political institutions to shape and order their society. All that was needed was a council at which everyone could speak, and at which people were reminded of their "sacred duties to the cosmos and to themselves".

Difference is also obvious if one considers that the most important social/political positions of leadership in tribes depended upon the personal prestige and charisma of the individual. Qualifications were primarily those of personal integrity and honesty. Due to such perception, it is not surprising that "most Indians had little respect for white military leaders who commanded their soldiers to go to war while remaining safely in the rear"<sup>3</sup>. In turn, it was the more difficult for whites to conclude that chiefs had some mystical but absolute power over the members of the tribe. This different approach on authority became transparent in exceptional moments, such as war: noting that the Indians would fight with great vigor until their leader was killed, and their spirit for the fight declined upon death of the war chief, the whites might have understood that this kind of influence went "far beyond that of the hereditary European monarchs over their subjects"<sup>4</sup>.

The extraordinary difficulty Indians and Europeans had in understanding each other's values is particularly applicable to legal issues. The imposition of individual values on Indian tribes contributed greatly to the erosion of their identity. While Euro-American civilization created/creates a pedestal for the individual and for individualistic values, the tribal solidarity and the shared sense of existence that emerges from this is the very *modus vivendi* for Indians. An overview on

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<sup>1</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 8.

<sup>2</sup> From this perspective, one can have a better understanding about the trauma of dislocation caused by the removal policy.

<sup>3</sup> *Ibidem*, p. 9.

<sup>4</sup> *Ibidem*, p. 10.

the evolution of the American legal doctrines that are applicable to Indians shows the multiple consequences this different perceptions have had over time, especially when it comes to the erosion of Indians' rights.

The most profound element that distinguishes Indian ways of governing from European/American forms is the fact that "non-Indians have tended to write down and record all the principles and procedures that they believed essential to the formation and operation of a government", while the Indians – benefiting from religious, cultural, social and economic homogeneity in their tribal societies – had no need to formalize their political institutions by describing them in a document<sup>1</sup>. Within tribal societies, authority did not depend on the written form of rules, nor on their compulsory enforcement.

Another basic difference is that in Indian communities violation of the customs involved action by the community to enforce its rules. The tribe, meeting in council, "discussed the violation and called upon its knowledge of precedents in community history which were factually close to the incident under consideration"<sup>2</sup>. The legal decision was devised to reflect the best solution for the community at that time, and therefore not always dependent upon following the former resolution of the problem. Given this flexibility, there was no need to formulate a rigid set of laws and even little inclination to make precedents absolute in the same way that the Anglo-Saxon tradition found necessary<sup>3</sup>.

It is, therefore, totally inadequate to apply and/or extend Euro-American concepts of Public Law, including the very idea of the social contract theory of government itself, to the Indian communities or to tribal societies generally. Indian tribal societies had no concept of civil rights: there was no need for limitation of the arbitrary authority over individuals, since every member of the society was related, by blood or clan responsibilities, to every other member. There was no fear of government intrusion within the Indian communities, in the sense perceived by Euro-Americans, because there was no such concept as "each citizen standing on an equal footing with every other citizen".

From this perspective, one might understand why – for instance – the passing of the Indian Civil Rights Act required tribal institutions to become a formal institution more completely resembling the federal structures than the "tribal government itself resembled either the state or the federal governments". The very essence of the destruction it brought to the Indian world can be summarized as follows:

"Traditional Indian society understood itself as a complex of responsibilities and duties. The Indian Civil Rights Act merely transformed this belief into a society based on rights against the government and eliminated any sense of responsibility that the people might have felt for one another"<sup>4</sup>.

As long as people did not have to confront each other before their community (which was essential for their sense of justice) but "only to file suit in tribal court", it is clear how far the effects of the *Indian Civil Rights Act* were from its purpose.

What the Indians were and are seeking for is a policy (and a legal basis derived from that policy) that would confirm their long-cherished belief that they

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<sup>1</sup> *Ibidem*, pp. 17-18.

<sup>2</sup> *Ibidem*, p. 18.

<sup>3</sup> *Ibidem*.

<sup>4</sup> *Ibidem*, pp. 213-214.



constituted nations as surely as France and England constituted nations. The heart of this issue leads to a general conclusion: the very perception that Indians are an "ethnic minority" is fundamentally wrong in its early legal and political settings, as well as in its long-term consequences. From their perspective, the civil rights idea was only "fit for speculation by liberals that who saw all minorities as constituting the same 'domestic' problem"<sup>1</sup>.

While Europeans and Americans had and have a hard time understanding Indian legal concepts and customs, the difficulty of communication is increased by the fact that religious beliefs and cultural patterns (in other words, crucial aspects of identity) have prevented Indians from organizing themselves socially or politically in a fashion familiar and acceptable to European minds. This might be the reason why, although traditional Indian norms and structures, as well as their modern counterparts in tribal constitutions and codes, are "Indian laws", but they are not the primary focus of federal Indian law.

There is a "long step" from a group of people living on an undisturbed an undiscovered continent to the immensely complicated "network of reservations" that presently constitutes the homelands of the American Indians. The long history involved divergent paths of theory, still intersecting in completely unexpected ways. Today, Indians are still considered to be "different", even "uniquely different" – and they are treated as such by the "greatest of all egalitarian societies".

Legal issues are one part of this – once again – immensely complicated reality.

But leaving aside the (undeniable) difficulties associated with law and time, an "ancient feeling of sovereignty" and its reconstitution goes to the very heart of Indian identity. Concepts like sovereignty have to be considered in the first place if one tries to find the highest level of abstraction, that would still be applicable to all Indian communities. This is true because of the primacy of land in the Indian world. As land was alienated, all other forms of social cohesion also began to erode, land having been the context in which the other forms have been created<sup>2</sup>.

Different legal doctrines have been created in order to justify – both legally and morally – this primordial alienation of Indian lands, that destroyed the very essence of their sovereignty. It has been argued that "the balance of power reduces the opportunities for using force; a shared sense of justice reduces the desire to use force"<sup>3</sup>. The achievement of this balance of power is especially complicated with regard to Indian issues – and this is because of the difficulties in defining "a shared sense of justice". If one tries to explore the depth of destruction indigenous peoples' world had to suffer, it is likely that this statement will lose any sense because of its very contradiction. And given the little insight one has into the world of authentic values in indigenous peoples' way of life, it becomes even more difficult to define what "to do them justice" means today.

Nonetheless, it is today that such issues are analyzed by philosophers like Bruce Ackerman. It is a matter of fundamental reflection to quote them here, before going on into further considerations of sovereignty:

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<sup>1</sup> *Ibidem*, p. 206.

<sup>2</sup> The precedent considerations and quotations follow Erica Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Chairperson of the Working Group on Indigenous Peoples, *Protection of the Heritage of Indigenous Peoples*, United Nations, New York and Geneva, 1997.

<sup>3</sup> Henry KISSINGER, *Diplomacy*, cit., p. 79.

"It is a tempting prospect which becomes more seductive as my effective power increases [...] Power corrupts: the more power I have, the more I can lose by trying to answer the question of legitimacy; the more power I have, the greater the chance that my effort at suppression will succeed [...] Yet I hope to take the question of legitimacy seriously:

What would our social world look like if no one ever suppressed another's question of legitimacy, where every questioner met with a conscientious attempt at an answer [...]?"<sup>1</sup>.

## THE DILEMMA OF SOVEREIGNTY

While describing the idea of Indian nations' sovereignty, one has again to be aware of the very different meanings the language we use implies. What is specifically meant here is that the same language invokes different, often incompatible values.

Sovereignty has provoked tremendous philosophical and/or political writings and debates over time. It has very different understandings – and value – in different civilizations and it is, therefore, reflected differently in the world's legal systems. And sovereignty obviously has more value for weak states than it has for stronger states and/or nations: this particular issue has to be considered with regard to the Indians.

From all these writings, only two reflections on sovereignty will be considered here.

We owe the first reflection to Jean Bodin, whose amazing statement on the sovereign's responsibility might come close to the Indians world: "The sovereign", Bodin wrote in the sixteenth century, "is bound to limit himself (only) towards God"<sup>2</sup>. This approach suggests that the ruler was submitted to the highest authority, but also suggests that the absolute meaning of sovereignty was achieved, if the sovereign's authority was in harmony with the divine one.

The second reflection belongs to Robert von Mohl, and his definition captures one for the Indian world amazingly appropriate aspect. "The sovereign's unique characteristic feature", writes von Mohl, "is his incapacity to limit himself"<sup>3</sup>. This last definition includes the very sense of dignity and integrity Indian communities have had over time while dealing with the federal government in issues related to their understanding about sovereignty. The sovereign "cannot limit himself": in its ultimate, philosophical understanding, this statement implies the conclusion that there cannot be two sovereigns<sup>4</sup>. The tragedy of the red man originates here and so does the legal history that relates to his most precious values.

<sup>1</sup> Bruce ACKERMAN, *Social Justice in the Liberal State*, Yale University Press, New Haven, 1980, p. 4.

<sup>2</sup> "Le Prince souverain n'est tenu rendre compte qu' a Dieu" – See Jean BODIN, *Les six livres de la Republique*, ch. 8, at. 182 (Original publishing 1576, reprinted at Beck, München, 1986).

<sup>3</sup> Robert von MOHL, *Staatsrecht, Volksrecht und Politik. Monographien*, vol. 2, Tübingen, 1862, p. 626.

<sup>4</sup> I am aware that this is an absolutism; but I believe that it captures the native American understanding about what we call "sovereignty". The realities of federalism, which include values like "cultivation of diversity", are the (both constitutional and factual) constructions Native

Legal history shows, that the doctrines created in order to justify the alienation of Indian lands were far away from Ackerman's approach about legitimacy. Meanwhile federal policy on Indian issues has shifted abruptly over time; therefore, federal Indian law presents "uniquely formidable" obstacles to the development of unitary doctrine. This is appropriate for the decisions in sovereignty-related issues as well<sup>1</sup>.

Rules and principles on Indian sovereignty issues have origins that go back to "pre contact times", predating the United States Declaration of Independence. But although the Founders articulated the act of separation from Great Britain's colonial empire in 1776, the European heritage is "unmistakably" reflected in the legal system established in the "New World". This heritage includes the legal system governing the United States' relations with Indian tribes.

Legal ideas applied by Europeans to American Indians' rights have medieval and Renaissance origins. The tribes' right to own the land has been consequently questioned under all these doctrines.

As such the crusading legal tradition appealed not only to legal, but also to religious values in order to justify the conquest of Indian lands. In this respect, it has been convenient for Europeans to invoke the holy figure of the Pope in Rome, "to whom God has given charge of the whole human race"<sup>2</sup>. The Roman Pontiff's universal power required obedience of the Catholic Church and the right to dispose on the Natives "as their highness may command". In the *Requerimiento* promulgated by the Spanish Crown's lawyers in 1513, "taking away your (the Indians') goods and doing to you all harm and damage that we can, as to vassals who do not obey and refuse to receive their lord"<sup>3</sup> was not at all questioned, nor was it, in any way, questionable, either from legal, nor from religious and/or moral point of view. It nonetheless captured the very essence of racism, since it not only stressed real or imaginary differences between the racist and his victim, but also assigned values to these differences, claiming that they are final and therefore justifying any possible aggression or privilege. One can see why the term "Black Legend" has been used to describe Spain's rapid colonization and destruction of the indigenous cultures and peoples in the New World<sup>4</sup>.

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Americans have to deal and *accommodate* with today. I believe that their *original* understanding on the ultimate decision-making power comes closer to the exclusive statement announced. The realities of today's federalism are just another outcome of the assimilation process Indians face, and another stage of this process. This is shown by the legal language in several Indian cases, specifically references to the Indians' "abstract" understanding of sovereignty – a reality "too mysterious to decipher".

<sup>1</sup> The confrontation is complicated because of the different times involved. But one cannot successfully argue that these are "sophisms" of "our time" and that therefore they can hardly be applied to vanished times. The debate over values and the Indian world has been going on since the time and the works of scholars like Franciscus de Vitoria and Bartolome de Las Casas. Along with Justice Marshall and other Supreme Court Justices, they are witnesses of those vanished times.

<sup>2</sup> It took centuries before humanity would start looking critically at this main fiction. And we are still struggling today with the implications of this concept.

<sup>3</sup> Reprinted in Charles GIBSON (ed.), *The Spanish Tradition in America*, University of Carolina Press, Columbia, 1968, pp. 58-60.

<sup>4</sup> The last decades' terror in Guatemala seems to acknowledge that its intention is "to complete at least the destruction of Mayan identity begun by the conquistadores". For an insight into the "rebirth of the Black Legend" in Guatemala, see Thomas BERGER, *A Long and Terrible Shadow...cit.*, 1991, pp. 111-125.

In contrast to this theory the writings of Franciscus de Vitoria came to explore the humanist idea of a natural law connection among all nations. Concentrating on the universal values of mankind – as they were expressed before and during his own lifetime (he was quoting the Bible, but also the works of Thomas d'Aquino) – Franciscus argued that "the Indians of the Americas", also free according to natural law, were nonetheless subject to the binding norms of the Law of Nations<sup>1</sup>.

But, as Foucault writes, "power is war", and power was "war continued by other means" for the Natives. The English North American colonial era would influence the United States federal Indian law and policy to the same destructive extent as the Spanish legal tradition did. This time, although the writings of jurists such as Gentili and Coke denied in theory the rights of "savage" Indian tribes to the territories they occupied, in practice the colonies often obtained the consent of the tribes through treaties and purchases in order to settle Indian-claimed lands<sup>2</sup>.

This moment in history opens the era of treaty-making. The tribes were numerous and powerful at that time, and signing a treaty might have been regarded as the most successful ways towards white settlement. There were instances where consent to voluntary purchases could not be freely obtained from the Indians and colonial officials reverted to fraud or outright confiscation in acquiring lands they desired, but it stays clear that this new reality involved the following assumptions: that both parties were "sovereign powers", that Indian tribes had "some" form of transferable title to the land and that the acquisition of Indian lands was a governmental matter, not to be left to individual colonists. Regardless to these considerations of a Public International Law nature, the treaties were existentially vital to Indians, who viewed them as "solemn guarantees". Given the fact that the oral tradition was almost an exclusive possession of the "traditional" people, they knew considerably more about the treaties than did other Indians. It is touching to read that these people "remembered the slightest nuance of meaning in every treaty promise", and they refer to it "as if the treaty was signed yesterday"<sup>3</sup>. For them, treaties were so sacred that they required "no more" than the integrity of each party for enforcement. It is also evident that there is little mention of the complex of ideas that constitutes nationhood in the treaty negotiations, although an important status was being changed by the agreement that people were making. And the Indians' comprehension of the full significance of the treaties is doubtful<sup>4</sup>.

This contradiction continued and aggravated after the United States successfully claimed to inherit Great Britain's right to buy the lands of the Indians. The

<sup>1</sup> As later explained by Felix Cohen, the greatest federal Indian law scholar, Franciscus de Vitoria has provided a "humane and rational basis for an American Law of Indian affairs". See Felix COHEN, *The Spanish Origin of Indian Rights in the Law of the United States*, Washington, D.C., 1942. He nonetheless wrote about "legitimate European power" over the Indians as a result of conquest in a "just" war or as a result of voluntary cession and agreement by the Indians. In this respect, see Franciscus de VITORIA, *De Indis et de Iure Belli Reflectiones*, E. Nys ed., J. Bate trans., Carnegie Institute, Washington, D.C., 1917.

<sup>2</sup> Also see Chester E. EISINGER, *The Puritan's Justification for Taking the Land*, *Essex Institute Historical Collections*, vol. 84, 1948, pp. 135-143/p. 131.

<sup>3</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 234.

<sup>4</sup> In *Worcester v. Georgia*, Justice Marshall admits that "when, in fact, they (the Indians) were ceding lands to the United states [...] it may very well be supposed that they might not have understood the term employed, as indicating that, instead of granting, they were receiving lands".

Discovery doctrine, "modified to fit the internal, domestic law of the United States, has been the primarily conceptual focus for all subsequent federal Indian law"<sup>1</sup>.

Sovereignty issues are directly or indirectly considered in almost all of the American Indian Cases. Extensive consideration in this section will be given only to the "Marshall Trilogy", for these early cases articulate fundamental legal principles, that have been developed later by the American jurisprudence with regard to "the Indians" and "the Indian tribes"<sup>2</sup>.

In the textbooks dealing with the roots of federal Indian law, the "Marshall Trilogy" is found under the heading "The Response of American Law to Cultural Contact with the American Indian". This is really the case, since the rules created in these cases became crucial for the "Indian-non-Indian" interaction in the broadest sense.

In the first case, in which the "opinion of the court" was "delivered by Chief Justice Marshall", "Johnson v. McIntosh" – decided in 1823 – legal justification was given to the doctrine of discovery. Phrased in "majestic language" which concentrates important information, a fundamental principle emerges from this case. Marshall validates over fifty years of "pre-independence" behavior, specifically related to transactions over Indian lands, by declaring that "the superior genius of Europe might claim an ascendancy", that "discovery gave title to the government by whose subjects, or by whose authority it was made, against all other European governments [...] and right of acquiring the soil from the natives, and establishing settlements upon it"<sup>3</sup>. Marshall's view on the absolute sense of sovereignty is consistent with von Mohl's philosophical approach, when he further writes that "the existence of this power (the federal government) must negative the existence of any right which may conflict with and control it". In other words, there cannot be two sovereigns, and, therefore, although the Indians were "admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion", their rights to "complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil [...] was denied by the original fundamental principle, that discovery gave exclusive title to those who made it"<sup>4</sup>.

Marshall's crucial role in creating the law was probably an aspect he was not aware of himself at the time this opinion was written. He nonetheless wrote about the necessity "to establish a principle" that would avoid "conflicting settlements". "Compensation" was given to Indians in terms of "civilization and Christianity", a view which, once more, favored the "exclusive right to extinguish the Indian title of occupancy" as a consequence of the discovery doctrine. Marshall's creative role leads to the articulation of the "political question doctrine" with regard to Indian issues: "It is not for the courts of this country", he writes, "to question the validity of this title, or to sustain one which is incompatible with it"<sup>5</sup>.

This case changed the Indians' status from independent nations to dependent ones. The fact that they were "different" was described by Marshall as the very

<sup>1</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 2.

<sup>2</sup> Answers to "who is an Indian" and "what is an Indian tribe" are of crucial importance for Indian identity. They will be considered later in this study.

<sup>3</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, Charlottesville, Virginia, 1975, p. 3.

<sup>4</sup> *Ibidem*, p. 3.

<sup>5</sup> *Ibidem*, p. 4.



reason why they were "ungovernable". The Indians were "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest".

The language in this case is not at all far from the one used in articulating the origins of totalitarian ideologies. Absolute concepts, such as "savagery" and "civilization" (considered as the antithesis of savagery, *nota bene*) were useful, even necessary in order to pretend that different human beings were "incapable of civilization" and, therefore, of "full humanity". Mythical phrases explaining that the Europeans had found "magnificent opportunity to pioneer in a savage wilderness and to bring civilization to it" are the rationalization for the invasion and conquest of unoffending peoples" and they function today "to smother retroactive moral scruples that have been dismissed as irrelevant to objective history"<sup>1</sup>.

The settlement of North America is an immense task. But the fact that the Europeans' intentions were to exploit rather than to settle or to "civilize" can not be disputed. One does not have to go into further detail; it is enough to mention here the hazards of vast wilderness, the logistical problems of supplying colonists from faraway Europe and/or the strangeness of the flora and fauna, and the hostility of the natives. All these elements were more than enough to give Marshall a view about the tremendous importance of his "original principle". It is obvious, in this case, that the law is the expression of a relation to power. But not only that: law has been important "both as a factor in the genocidal extermination and as a weapon in the contemporary struggle for survival". For most of the 19<sup>th</sup> century, it constituted "both a formal and informal agent of genocide"<sup>2</sup>. If one touches the issue of legitimacy as the highest moral understanding about law and justice, the cruel irony is that American law witnesses an unconceivable complicity between law and genocide in the creation of its very first legal concepts that apply to Indians. As de Tocqueville expressed it, it would be "impossible to destroy men with more respect for the law"<sup>3</sup>.

The two cases that follow are no exception to this trend. On the contrary: they regularize the process of Euro-American appropriation and genocide<sup>4</sup>.

In *Cherokee Nation vs. Georgia*, Justice Marshall had to argue the idea of federal sovereignty over the Cherokee Indians and to oppose it to the claims for sovereignty made by the state of Georgia over the same Indians. Being a federalist and having to deal with the supremacy of policy over the legal issues, Marshall describes in the same majestic language how the Cherokees were "gradually sinking beneath our ('the whites') superior policy". The rival concepts on sovereignty he had to deal with lead him to analyze the complicated relationship between the federal government and the Indian tribes in more detail. He mentions the 'numerous treaties' made with the Cherokees, the fact that they were "recognized as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements [...] The acts of our governments plainly recognize the Cherokee nation as a state, and the courts are

<sup>1</sup> Francis JENNINGS, *The Invasion of America: Indians, Colonialism and the Cant of Conquest*, University of North Carolina Press, Chapel Hill, 1975, pp. 15-16.

<sup>2</sup> Dennis STRICKLAND, "Genocide-at-Law: A Historical and Contemporary View of the Native Experience", *University of Kansas Law Review*, no. 34, 1986, p. 713.

<sup>3</sup> Quoted in *ibidem*.

<sup>4</sup> Obviously, there are many different ways of committing "a crime". Cultural destruction is definitely one of these ways, and it involves questions of moral responsibility that are strongly related to collective memory, but also to the perception about "the other".



bound by those acts"<sup>1</sup>. But although Marshall was ready to admit all these facts, he nonetheless stated that "a question of much more difficulty remains", and that was whether the Cherokees constitute a foreign state in the sense of the Constitution. And he concludes that "these tribes which reside within the acknowledged boundaries of the United States" can hardly be called "foreign nations" with strict accuracy. Fundamental concepts are found here: Marshall calls the Indians (thereby extending the situation of the Cherokees to all Indian tribes) domestic dependent nations, who are in a state of pupillage.

While referring to the constitutional clause which regulates "commerce with foreign nations, and among the several states and with the Indian tribes", Marshall's argument is that the legal language "contra-distinguishes the Indians from foreign nations". From the Indians' point of view – who have always regarded themselves as foreign nations, invested with inherent sovereignty – this must have been unacceptable. But there is little feed-back on that in this case, as in many others. However, one should add that, from the Indians' point of view, Marshall's assertion on the distinctiveness of the Indians ("they are designated by a distinct appellation; and this appellation can be applied to neither of the others, neither can the application distinguishing either of the others be, in fair construction, applied to them") does not fulfill its promise<sup>2</sup>.

The famous words of the Chief Justice ("their relation to the United States resembles that of a ward to his guardian") are also found in this case. Although his opinion never uses the term "federal trusteeship over Indian affairs", it constitutes the origin, in the Supreme Court, of this "important and controversial" notion in federal law. Whether Marshall contemplated, in his own lifetime, that the federal trusteeship over Indian affairs would constitute an independent source of federal authority over Indian affairs (as later invoked in cases like *United States v. Kagama* and *Lone Wolf v. Hitchcock*) is a complex question. Whether the here implied trusteeship created enforceable legal relationships, as further developed by the American jurisprudence, is equally unclear: the multiplicity of Marshall's language gives rise to different and even controversial interpretations.

A brief insight into the historical background in this case can clarify some of the issues involved. The Cherokees are described as "one of the Five Civilized Tribes". Their institutions must have been more comprehensible to Euro-Americans than the ones other tribes had. As early as 1802, when President Jefferson urged the Cherokee to adopt "a republican form of government" their "receptiveness to Euro-American society, including intermarriage with Scottish traders" allowed them to appear as "the most successful product" of Jefferson's "civilizing" policy<sup>3</sup>. In 1827, the Cherokee Nation created a written tribal Constitution, patterned after the United States Constitution. Georgia's land policies came into conflict with Cherokee national political development and "produced the first great constitutional conflict in United States history over Indian policy". Since the political and economic development of the Cherokee Nation was "too much for Georgia", state legislation in 1828 annexed the lands of the Cherokee Nation to Georgia counties. This provision made Cherokees "outlaws in their own lands", and the oppressive measures against them were defined by the state of Georgia as "exercises of sovereignty". It

<sup>1</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 8.

<sup>2</sup> In spite of its masterful multiplicity, in both language and conception.

<sup>3</sup> *Ibidem*, p. 12, n. 58.

seems that it was incomprehensible both for the state of Georgia and for the federal government why the Cherokees, in spite of their "civilization" still wanted to be regarded as different and why it was impossible to assimilate them into the "larger society". Perhaps for the reasons exposed so far, they are often described as being "the most controversial tribe".

Further concepts with tremendous impact on the later practice of the American courts, but also on the federal policy regulating "Indian affairs" are found in *Worcester v. Georgia*. This time, Marshall's language is different. He writes that "history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who [...] might seduce them into foreign alliances". Invoking the Treaty of Hopewell, signed between the federal government and the Cherokee Nations in 1783, he concludes that the Cherokees "are under the protection of the United States of America and of no other power". The idea here is that the federal government and federal law protects tribal sovereignty and that the treaties with the British Crown did not imply "a right to take the Indian lands" either. Marshall states that federal protection over the Indians could not include the "management of all their affairs", since this would be "a perversion of the necessary meaning" of this expression. But, in this case, Marshall's intention to speak in favor of Indian sovereignty is limited to a specific framework. While he admits that words like "treaty" and "nation" are "words of our (the whites') own language, selected in our diplomatic and legislative proceedings, having a definite and well understood meaning and being applied to all nations on earth in the same sense", and that "the Indian nations have always been considered as distinct, independent communities [...] from time immemorial", he nonetheless mentions "the single exception imposed by irresistible power"<sup>1</sup>. And this exception is the reason why, according to Marshall, the Cherokees (and the Indians generally) were necessarily dependent on some foreign potentate for the supply of their essentials wants.

Although the consequences of this exception implied that "this relation was that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character", the annihilation of the Cherokee nation in its political existence is obvious and unavoidable. Even if the Cherokee nation occupies its own territory, with boundaries accurately described, in which "the state of Georgia can have no force", their sovereignty is "measured" against Georgia's claim and not against the federal government's sovereignty. The Cherokees are no longer equal, in the sense of International Law, as sovereign, foreign nations – they are "domestic" and "dependent". The crucial issue in this case is that the laws of Georgia were rendered invalid and unconstitutional not because of the "continued existence" of Cherokee tribal sovereignty, but due to the federal law and policy protecting (or claiming to protect) tribal sovereignty. Although it deals with issues of the "highest importance", this case cannot illuminate a severe moral question and that is: From whom did the Indians need protection? Was the state jurisdiction the only menace to their identity, or did the "exception of irresistible power" include the claims to federal power (and later, the claims to federal plenary power) over Indian issues...? And what could have been their choice, to their own good, in this context anyway...?<sup>2</sup>

<sup>1</sup> *Ibidem*, pp. 24-25.

<sup>2</sup> The severity of this (equally moral and legal) issue is revealed if one considers that cases like "Worcester" and "The Cherokee Nation" won only the legal doctrine battle, but they ultimately

Nonetheless, proposals for the formation of an Indian state frequently appeared in the treaties signed with the federal government. While "never fulfilled, this idea is as old as the nation"<sup>1</sup>.

Possible feed-back from the "Indians' world" is vital in order to understand more about the implications of the Marshall Trilogy concepts. There can hardly be a more complex insight into such considerations than Cohen's comments on the meaning of "wardship". First, the Federal Indian Law scholar specifies that terms such as "guardianship" and "trusteeship"<sup>2</sup> have to be understood in relation with Congress' intent to "determine when and in what manner" this special relationship should apply and when it should cease. He also makes it clear that "this relationship does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships". However, the "ward-guardian" relationship needs to be considered under "more precise topical headings", as Cohen is, in fact, doing in his treatise on federal Indian law<sup>3</sup>. One has to be aware that the term "ward" has been applied to the Indians in "many different senses", and that "the failure to distinguish among these different senses in some instances may create confusion". Cohen also emphasized that "in fairness to the great Chief Justice, it must be said that he used the term with more respect for its accepted legal significance than some of his successors have shown". The term was applied to Indian tribes, and not to individual Indians; moreover, what Marshall said was only that the relation to the United States of the Indian tribes within its territorial limits resembles that of a ward to his guardian<sup>4</sup>.

But in spite of Cohen's brilliant distinctions in the field of legal abstraction (see his nuance on "wards as domestic dependent nations", "wards as individuals subject to Congressional power", "wards as beneficiaries of a trust" or "wards as

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lost the war of federal policy "in the halls of Congress and in the White House". Marshall's rhetoric about the "legally protected separate sovereign status of the Cherokees could not prevent the removal of the Cherokee Nation, nor the Trail of Tears".

<sup>1</sup> See Article VI of the *Treaty with the Delawares* (1778) and Article 7 of the *Treaty of New Echota*. The idea that the Indian country "to the westward" should constitute a Territory "for the red man only" was clearly defined, but never became reality. Natural law was certainly interesting for Marshall (as it must have been for some of the early colonists and European lawyers), but he nonetheless preferred to rely on positive law in the decision making process. Whether a separate Indian state would have been "compatible with" nineteenth-century American constitutional concepts of federalism or with twentieth-century concepts of federalism (as some authors suggest as a topic for further study) is certainly a research subject related to the realistic implementation of the basic value of federalism: to cultivate diversity. From constitutional point of view, it also implies a clear understanding on political harmony between the different states (political entities) constituting the federation, for the states' will to join the federation is essential.

<sup>2</sup> The trustee relationship has been developed tremendously by the American jurisprudence. Cases like *United States v. Mitchell*, decided in 1983 explain the meaning of the federal government's fiduciary responsibility for the management of allotted lands. The responsibility for mismanagement is also considered here. However, to which extent the idea of "compensation" can replace a value that is no longer there remains very questionable, for it is clear that money compensation could never replace the crucial importance of the land in Indian culture. The trust relationship has always been the source of two opposite views: one emphasizing federal power, the other emphasizing federal responsibility. A "degrading ethnocentrism" supports this theory in both its views.

<sup>3</sup> For further insight, see Felix COHEN, *Federal Indian Law*, United States Government Printing Office, 1958, pp. 558-566.

<sup>4</sup> Felix COHEN, *Federal Indian Law*, cit., p. 559.

non-citizens")<sup>1</sup> these for the Indians crucial distinctions have not been analyzed as such in the courts' practice of in Congressional policy over time.

So far it is clear that even a concept like sovereignty, which in its final philosophical beauty is absolute and which is perceived as such in the Indian civilization – given their sacred respect for the cosmic order and for the established order of human existence – could not be considered outside the temporal framework.

The historical and political contexts have limited the Indian notion of sacred, inherited sovereignty. Therefore, a historical perspective over federal Indian policy and law is necessary.

### DISTINCT PERIODS IN FEDERAL INDIAN POLICY AND THEIR LEGAL IMPLICATIONS

"Quite easily done – a paradigm of American policy. Aboriginal title, solemn treaties, and the goodwill of presidents were never enough to protect the Indians."

Thomas BERGER

The drama of "separate cultures and uniform law" in the specific case of Native American identity requires deeper inquiry. The subsequent legal analysis is there circumscribed into this essential framework.

Federal Indian law is "a subject that cannot be understood if the historical dimension of existing law is ignored"<sup>2</sup>. The insight into federal Indian law necessarily has to avoid the lawyers' "general view on existing law", since, should that be the case, "the body of laws thus viewed is a mystifying collection of inconsistencies and anachronisms". The most enlightening synthesis on this aspect is found in Attorney General Legare's description: "There is nothing in the whole compass of our laws so anomalous", he wrote in 1842, "so hard to bring within any precise definition, or any logical and scientific arrangement of principles, as the relation in which Indians stand towards this government and those of the states"<sup>3</sup>. Therefore, such complex diversity can be simplified only "at the risk of ignoring facts and violating rights"<sup>4</sup>, especially if considering that the legal cases involving Indians have been nothing more than an attempt to clarify the federal government-Indian tribes relationship.

No one could master the literature covering five hundred years of White-Native relationships in two continents in a lifetime. If the expertise is limited to the American Indians in North America, the history of federal Indian policy can be divided into the following distinct periods: the colonial period (1492-1776), the confederation period (1776-1798), the *Trade and Intercourse Act* era (1789-1835), the removal period (1835-1861), the reservation policy (1861-1887), the Allotment period and forced assimilation (1871-1934), the *Indian Reorganization Act* period

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<sup>1</sup> *Ibidem*.

<sup>2</sup> See Nathan MARGOLD's introduction to Cohen's *Handbook of Federal Indian Law*, U.S. Department of the Interior, Office of the Solicitor, Washington, D.C., 1942.

<sup>3</sup> As quoted by Felix COHEN's *Handbook of Federal Indian Law*, 1958, p. 515.

<sup>4</sup> *Ibidem*.

(1934-1940), the termination era (1940-1962), and the self-determination era (1962-present).

Due to the changing federal policy toward the Indians, however, these periods are of a rather conventional nature, if one examines the often controversial legal decisions passed during all this time and their long-term consequences.

### *The Colonial Period*

"The state called 'America' is connected only to an independent settler colony. It has no place of its own, nor did it ever."

Jimmie DURHAM

The extent of power is always settled within "geographic and subject matter boundary lines"<sup>1</sup>. Expansion of a frontier always means expansion of a certain ideology and of a specific perception about human knowledge. In the case of the Native Americans and their civilization, the expansion of the Euro-American frontier (as described by the early settlements doctrines and by the later "manifest destiny" ideology) remains the main cause of identity destruction.

The colonial period was characterized by wars of conquest and by Indian resistance, but also by diplomatic dealings<sup>2</sup>.

### *The Confederation Period*

The main objective of United States' Indian policy during the Revolution was to preserve the neutrality of the Indian tribes. The first treaties between the United States and the Indians are an outcome of this policy. There, they treat the Indian nations as sovereign entities. Significantly, the Treaty with the Delaware Nation contemplated the possibility that the United States "might invite the Delaware Nation to form a state and join the Confederation with other tribes allied to the national government". The same treaty regulates an important jurisdictional issue: "The punishment of crimes by citizens of either party to the prejudice of the other would be by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice"<sup>3</sup>.

Respect for Indian sovereignty is also found in the language of the Treaty of Hopewell, signed in 1785. The "Commissioners' Plenipotentiary of the United

<sup>1</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 36.

<sup>2</sup> See the treaties between New York and the Five Nations Iroquois Confederation, Georgia's treaties with the Creeks and the Carolinas or the proposed Union of colonies under Benjamin Franklin and the "Proclamation of 1763: Colonial Prelude to two Centuries of Federal-State Conflict over the Management of Indian Affairs", *Boston U.L. Review*, vol. 69, 1989, p. 329. For a historical perspective on the Iroquois Confederacy, see Thomas BERGER, *A Long and Terrible Shadow...* cit., the chapter on "Indians as Allies: The Iroquois", pp. 55-65. The same study mentions that the Iroquois were aware of their "remarkable past", including the fact that their Confederacy inspired the framers of American Constitution.

<sup>3</sup> See Article IV of the *Treaty with the Delawares*.



States, in Congress assembled"; says the Treaty's preamble, "give peace to all Cherokees", and Article III acknowledges "all the Cherokees to be under the protection of the United States of America, and of no other sovereign power whosoever"<sup>1</sup>. In the logic of Article XI we find the meaning of this protection, as it was understood by the Cherokee Indians: "That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress". The same treaty regulates the Cherokees' *exclusive* criminal jurisdiction:

"If any citizen of the United States, or any other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted to the Indians for their hunting grounds [...] such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please".

In a similar manner, Article XI states that "the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing their affairs in such manner as they think proper"<sup>2</sup>.

The values involved here, like "peace", "justice", "confidence" are supposed to be protected in good faith by the parties. It is obvious that the Cherokee Indians did not understand the protection of the United States to intrude into their sovereignty. The mention of "trade with the Indians" in Article XI is not a relinquishment of Indian sovereignty, but a regulation that concerns free trade between two nations.

### *The "Trade and Intercourse Act" Era*

The adoption of the American Constitution "ushered in a new era in the national management of Indian affairs"<sup>3</sup>. Especially relevant to the treatment of Indians are the constitutional Commerce clause and the exclusion of "Indians non taxed" from the enumeration of state citizens for purposes of congressional appointment, "thereby suggesting that they were no part of the polity"<sup>4</sup>. Indians are viewed here as individuals: the phrase testifies to the idea that Indians, as individuals, "could not be assimilated into the body politic". Also, "in the world of Anglo-Saxon property owners this meant paying taxes". The Indians were still outside the reach of American sovereignty and its taxing power<sup>5</sup>.

But other trends in federal Indian policy appeared soon. In his *Federalist Papers*, Madison mentions that it is incomprehensible how a "trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal right of legislation"<sup>6</sup>. The first legislative effort made by Congress in order to assert the

<sup>1</sup> A stipulation found in Indian treaties generally.

<sup>2</sup> See *Treaty of Hopewell*, Nov. 28, 1785.

<sup>3</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 142.

<sup>4</sup> *Ibidem*, p. 142.

<sup>5</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 3. Taxes must have been perceived as a nonsense by the Indian communities, and – from their perspective – for very good reasons, since they had no utilitarian concept on property.

<sup>6</sup> See James MADISON, *The Federalist*, no. 42, 1788.



national government's exclusive control over Indian affairs was the enacting of the *Trade and Intercourse Act* in 1790. The efforts to place the exclusive management of trade, diplomatic relations, and land cessions involving the Indians in the hands of federal government was resisted by the states, a fact that often led to constitutional tension. Permanent Trade and Intercourse Acts followed in later years; however, significant for this time are the efforts made in the treaties in order to establish clear lines of demarcation separating "protected Indian country enclaves from other lands claimed by the state"<sup>1</sup>.

### *The Removal Period*

Until the War of 1812, the federal government did little to further the removal of the Indians, given the fact that Indian tribes, especially those on the western frontiers, "held an important balance of power on the North American continent"<sup>2</sup>. It was essential to prevent any alliance between the Indians and the English; but the outcome of the war ended this threat, setting the stage for Indian removal.

The governments of the states became "increasingly dissatisfied" with the continued existence of Indian tribal "enclaves" within their boundaries. The erosion of tribal sovereignty therefore led to an invented relationship between the original sovereign before discovery (the Indians) and the successors of the European settlers' structures of power (the federal government). As seen in *Cherokee Nation v. Georgia* and in *Worcester v. Georgia*, Georgia's legislation set the scene for the removal of the Indian tribes. Similar statutes were passed for the Creeks and Choctaws in Alabama and for the Cherokees in Tennessee. In spite of their efforts to resist the state statutes through federal court litigation, the Cherokees – like most of the other tribes in the southeastern states – were removed from the states and – resettled" on the west side of the Mississippi River in the Indian Territory, now eastern Oklahoma.

Coming back to the reflections over the frontier expansion, one has to keep in mind that, until at least 1861 a central theme in federal Indian policy was the removal of the tribes beyond state boundary lines, often as a prelude to the admission of new states into the Union.

### *The Reservation Policy*

Efforts to remove the Indian tribes from the states was doomed once westward settlement "leap-frogged the Indian Territory to California"<sup>3</sup>. The creation of "smaller reservations" started as an "experiment" done by federal agents. Treaties were negotiated between California tribes and the federal government in the early 1850's, but the Senate refused to ratify them, because they departed from the "declared removal policy of clearing resident Native American tribes from the states"<sup>4</sup>.

<sup>1</sup> See, generally, Felix COHEN, *Federal Indian Law*, cit.

<sup>2</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 144.

<sup>3</sup> *Ibidem*, p. 146.

<sup>4</sup> *Ibidem*.

The first congressional recognition that "such reservations" were intended as "permanent jurisdictional enclaves within the states" is found in the *Enabling Act for the Kansas Territory*. This act authorized the formation of the state of Kansas. It stated that the establishment of the state "would not be construed to extend state jurisdiction over Indians of the Kansas territory or to impair the rights of Indians of their property in the territory"<sup>1</sup>. Since such disclaimer of jurisdiction established a pattern, the enabling acts and constitutions of many states admitted to the Union after 1861 contained similar provisions.

But this is just the legal side of the reservation policy. The beginnings of the reservation system have to be understood in their real dimension: the military one. Federal military "efforts" were done in order to force Indian tribes into reservations or forcibly keep them there. Most of the Indian wars of the last half of the century were caused by the "reservation policy". They culminated in 1876 and 1877 in two famous encounters between the Army and the Sioux, and between the Army and the Nez Perce Indians. It has been said that these wars "are etched" in the American imagination, since, for them, the "golden-haired General Custer is the most evocative symbol of the Indian wars"<sup>2</sup>. According to Berger, the events leading to the Little Big Horn are "a metaphor for the betrayal of promises that led to the Indian wars"<sup>3</sup>. The surrender of the leader of the Nez Perce Indians of Wallowa, Chief Joseph, in 1877 was "not" "a heroic moment for the United States army", and so were many others in federal Indian policy. But this particular moment has to be mentioned here because it put an end to the wars against the Indians. When Chief Joseph handed over his rifle to the Army, he spoke the words that have become "the requiem for the Indians of the plains":

"I am tired of fighting [...] The old men are all dead. Hear me, my chiefs, I am tired, my heart is sick and sad. From where the sun now stands, I will fight no more forever"<sup>4</sup>.

The dignity in these words should make everyone to keep silent. One has to keep in mind that, for the Indians, the reservation system was nothing else than an alternative to extinction<sup>5</sup>. The aftermath of Chief Joseph's surrender was as tragic as the defeat of the Nez Perce Indians itself: the promise that the Nez Perce would be allowed to return to Idaho, to live there on a reservation, was not kept. Not even on a reservation. They were sent to Oklahoma, far from their ancestral lands, where they have, "ever since", mourned their lost freedom<sup>6</sup>.

The reservation was not only a means of "keeping non-Indian settlers off Indian lands", but merely to keep the Indians forcibly fenced within geographic and political lines of demarcation. This aspect is particularly tragic for Indians, if one considers that, to the Indians, land is inalienable. They believe that land is held in common by all members of the tribe, "a political community that is perpetual".

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<sup>1</sup> R. CLINTON, "Development of Criminal Jurisdiction over Indian lands: The Historical Perspective", *Arizona Law Review*, 1975, pp. 960-961.

<sup>2</sup> Thomas BERGER, *A Long and Terrible Shadow...cit.*, pp. 88-89.

<sup>3</sup> *Ibidem*.

<sup>4</sup> *Ibidem*, p. 91.

<sup>5</sup> See Robert TRENNERT Jr., *Alternative to Extinction: Federal Policy and the Beginnings of the Reservation System, 1846-1851*, Temple University Press, Philadelphia, 1975.

<sup>6</sup> See Thomas BERGER, *A Long and Terrible Shadow...cit.*, p. 82.

Since earth itself is a living being for the Indians, setting fences and forcing them to "accommodate" themselves to this "new" reality was unbearable for them and it explains the high mortality rate, alcoholism and poverty one sees even today in Indian reservations.

The overall organizations of reservations councils "seem to have occurred in conjecture with" the establishment of the courts of Indian offenses by the Bureau of Indian Affairs<sup>1</sup>. This administrative development was "triggered" by the *Crow Dog* case, which upheld the preservation of tribal law in areas that had been reserved by the Indians in a prior treaty. Nonetheless, the language in this case assumed – without any basis whatsoever – that the Indians had no government and were in "desperate need" to learn elementary kinds of organization "for their own good". It is an illustration of cultural "blindness", as Deloria called it.

The case dealt with a murder of a Sioux Indian by another Indian in Indian country. It was claimed that the crime was not "an offense under the laws of the United States, and that the district court had no jurisdiction to try the prisoner"<sup>2</sup>. It is easy to see that the issues involved in this case are not only jurisdiction, but also important aspects of identity and difference. The language of the court uses, "they [the Indians] were subject to the laws of the United States, but not in the sense of citizens, but as wards subject to a guardian"; law is perceived as "the imposition of an external and unknown code", which makes "no allowance for their inability to understand it", and which, being "opposed to the strongest prejudices of their savage nature", measures, "the red man's revenge by the maxims of the white man's morality") demonstrates a multiplicity which opens the way for divergent interpretations. On one hand, treatment of the Indians is, once again, paternalistic; but nonetheless the conclusion on handling the difference is "to secure these people, with whom the United States was contracting as a distinct political body"<sup>3</sup>.

As in many later cases, the attempt to clarify the relationship between the Indians and the government of the United States was not successful. If one explores the non-Indian responses to *Crow Dog*, it seems that the fact that one group can exercise power while another cannot, could be considered to be just a matter of "historical accident".

*Crow Dog* led to a Congressional response – the passing of the *Major Crimes Act* in 1885 – and to an administrative response – the creation of the courts of Indian offenses. The *Major Crimes Act* extended federal court jurisdiction over the serious crimes of murder, manslaughter, rape, burglary, larceny, assault with intent to kill, and arson committed by one Indian against another Indian. Although this statute stated that it was applicable to "all Indian reservations", it did not apply to the Five Civilized Tribes. Under the treaties of 1866, they were allowed "a measure" of self-government, which included a complete code for law and order in tribal courts with the appeal to the federal district court of Arkansas. The tribes retained complete civil and criminal jurisdiction until the act passed in 1898, which prohibited the enforcement of tribal laws in the special federal court having exclusive jurisdiction over the Indian territory. The same act abolished the tribal courts<sup>4</sup>. Although "nothing in the language of the act compels the conclusion that the tribe

<sup>1</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 29.

<sup>2</sup> See *Ex Parte Crow Dog*, 109 U.S. 556 (1883)

<sup>3</sup> *Ibidem*.

<sup>4</sup> *US. Statutes at Large*, p. 30, 495.

lost concurrent jurisdiction over these major offenses"<sup>1</sup>, treatment of the Indian courts confirmed the policy that they should not have "too much" power. The drama of Indian isolation in a foreign world includes the Indians' difficulty in mediating between the customs and traditions that their people cherished (following the removal from the South to Oklahoma, the tribes adopted constitutions and laws that incorporated traditional political forms) and the need to present to the larger society a form of political organization that "seemed clear, reasonable and within the established political tradition of the larger society"<sup>2</sup>.

While examining the assimilative goals of the reservation policy, it is important to note that, from the federal government's point of view, "the reservations provided a classroom for Indian wards". The devastating role of ideology is clear if one reflects about the implications of the following statement: "Should rules that are designed to educate be different from rules that are designed to discipline?" ... If the basis for the reservation concept was its educational function, and not a notion of entitlement to land and right to a culture (and there is clear evidence in this sense), then Indian sovereignty was to suffer terrible limitations. For there is nothing more destructive than indoctrination, in the name of progress and the Indians' "own good": The teacher here is the federal government – and nothing is left of inherent Indian sovereignty, if the reservation is regarded as a "way station" between the society prior to the advent of the European settlers and the society when reservations would no longer be needed"<sup>3</sup>. The most obvious limits are the ones placed on the power of the tribe to assert jurisdiction over non-Indians within its mists, at least in criminal matters. Jurisdiction is an essential aspect of sovereignty; and the federal policy's intent to limit it is clear if looking at later cases, like *Oliphant vs. Squamish Indian Tribe* (which was decided in 1978, and where the court concluded that Indian tribal courts do not have criminal jurisdiction over non-Indians, a position confirmed in *Duro v. Reina* in 1990)<sup>4</sup>.

The method of interpretation used in *Oliphant* – in concrete the tremendous reference to legal history that is found in this case – is puzzling, at least from the moral point of view<sup>5</sup>. The case assumes that Indians "necessarily gave up" their power to try non-Indian citizens of the United States, "except in a manner acceptable to Congress". There is no consideration for Indian sovereignty in this case, and the decision is definitely of a sectarian nature. If one looks at the problem from a different perspective, one has to conclude that it was because of the *overriding sovereignty of the United States* that Indian reservations had not necessarily be seen as a part of the

<sup>1</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., pp. 35-36.

<sup>2</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 25.

<sup>3</sup> A retrospective analysis on federal Indian policy might, indeed, confirm that the termination of Indian tribes started with the conviction that Indians in the reservations "graduated". The expression used here has the sense to illustrate paternalistic attitude of the federal government. As later explained in this study, it brought the federal trust relationship and the federal benefits for Indians to an end.

<sup>4</sup> Mentioning these cases here is due to the anomalous relationship between the Indian tribes and the federal government. This anomaly applies to time as well, since early cases and their judicial effects have been dramatically challenged later on. From this point of view, there is no chronological order, nor can a chronologic understanding be found in these cases (not to mention here the difficulties of interpretation in every case).

<sup>5</sup> It is agreed that one cannot find a "common" logic in exploring Indian cases, given the shifting federal policy towards Indians and the "immense historical shocks" Indian communities had to suffer.

territory of the United States. Clearly an expression of a relation to power, the outcome in this case is that, while federal government could set the rules for "Indian – non-Indian" interaction in criminal matters, the Indians could not.

### *The Allotment Period and Forced Assimilation*

Structural changes in federal Indian policy were signaled in the period from 1871 to 1887. Meanwhile, implementation of the reservation policy continued. The year 1871 ended formal treaty making with the Indian tribes. The House of Representatives' dissatisfaction with the "preeminent role in Indian affairs that the treaty ratification process gave to the Senate" decided to cut off the funds for treaty negotiation in 1867. After 1871, agreements with Indian tribes, although negotiated, were approved by statutory enactment. The allotment policy aimed to encourage a sedentary, rural agricultural life for the Indians and to transform them into farmers. The *General Allotment Act* of 1887 only stated and authorized this general policy, its implementation was left to individual negotiations with the affected tribe and the discretion of the executive. Although allotment was not implemented on all reservations, the land base of many tribes was ravaged by this policy. Section 5 of the *Act* provided that "surplus" land (not needed for the fixed acreage allotment to tribal members) would be ceded to the federal government for compensation through negotiations with the tribe. Beside new devastating effects on Indian cultural values, this policy of alienation opened the "surplus" lands to non-Indian settlement. The effect was that Indian reservations were opened to non-Indian settlement for the first time.

The long interaction between Indians and non-Indians at this particular time led to cruel contradictions, like the support of the allotment program by some Indian advocates. These right supporters thought to protect the Indians: an Indian "holding a patent from the federal government, restricted against alienation, enjoyed greater security for his land tenure than the protection afforded by tribal possession"<sup>1</sup>. Once again, this process illustrates the difficult communication between the two systems of values. Many people within the tribes held tenaciously to their old customs, and continued to live their lives according to ancient ways. Even if badly eroded, these customs did not disappear. The Indians' belief that land was unalienable was one of these strong identity patterns. But the prediction that a change from communal title to individual title would concentrate ownership of Indian land in the hands of a few persons was ignored. The idea that welfare and happiness requires that the lands be held in private ownership and managed in person by its individual owners proved to be "the most established principle in the American mind"<sup>2</sup>. The main effect of this policy resulted in the destruction of the Indians' cultural life basis: tribal identity. For the federal policy, "progress" meant the end of the lands held by the Indians on the reservations and the end of the governmental power exercised on them<sup>3</sup>.

<sup>1</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 149.

<sup>2</sup> Thomas BERGER, *A Long and Terrible Shadow...cit.*, p. 101.

<sup>3</sup> Later statutes authorized the leasing of tribal and allotted lands both for surface occupancy and for mineral, oil, and gas development. Restraints on alienation were progressively removed.



Complementary policies in order to assimilate the Indians involved the formation of the Bureau Policy and the Courts of Indian Offenses. These institutions involved the employment of Indian tribal members to serve as police officers and judges for their reservations: an alternative power structure to the traditional forms of tribal governance. "New offenses", as defined in the *Code of Indian Offenses* not only included serious criminal behavior, but also many traditional Indian cultural and religious practices. The most dramatic confrontation between Indian values and the attempt to destroy them was then prohibition on the Sioux Indians' Ghost Dance, "a messianic native religious movement", which produced the massacre at Wounded Knee in 1890<sup>1</sup>.

This era produced another act with important consequences for the Indians: *The Indian Citizenship Act*, passed in 1924. United States citizenship was conferred to "all non-citizen Indians born within the territorial limits of the United States". This *Act* simplified provisions of the *General Allotment Act* and various former statutes and treaties regulating Indian citizenship<sup>2</sup>. For instance, early treaties implied that citizenship was incompatible with continued participation in tribal government or tribal property free from state jurisdiction or control. But, as explained by Cohen, "today many people who know that Indians are citizens are unaware of the legal consequences of citizenship". He further mentions the more common errors in a brief description: if citizens of the United States, Indians automatically become citizens of the state of their residence – (and what is then left of the incompatibility between tribal membership and citizenship?) also, citizenship has not been held incompatible with federal powers of guardianship, nor did it automatically confer Indians the right to vote<sup>3</sup>.

However, the rules of citizenship in the Anglo-Saxon legal tradition are totally alien to Indian concepts on membership. Within a tribal society, "the simple fact" of being born establishes both citizenship and, "as the individual grows", a "homogeneity of purpose and outlook". Because customs, ritual and traditions are "part of natural life", there is no need for formal articulation of the rules of Indian tribal society, including membership<sup>4</sup>.

### *The "Indian Reorganization Act" Period*

It was only in 1928 when a report was issued, summarizing the failure of the federal policies followed since the late nineteenth century<sup>5</sup>.

The appointment in 1933 of John Collier as Commissioner of Indian Affairs marked "the emergence of a very different kind of consciousness" towards the Indian issues. Collier knew and deeply admired Indian culture. His fascination is described in his book *From Every Zenith*, with regard to the Taos Pueblo's Red Deer

<sup>1</sup> See generally D. BROWN, *Bury My Heart at Wounded Knee*, Hold, Rinehart & Winston, New York, 1970 and A. DEBO, *A History of the Indians of the United States*, University of Oklahoma Press, Oklahoma City, 1974, pp. 290-294.

<sup>2</sup> For a detailed insight, see Felix COHEN, *Federal Indian Law*, cit., pp. 517-523.

<sup>3</sup> *Ibidem*, pp. 523-526.

<sup>4</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 18.

<sup>5</sup> See the Miriam report (entitled "Problems of Indian Administration"), as mentioned in R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 152.



Dance. "What I observed", he writes, " was a power of art – of the life-making-art – greater in kind than anything I had known in my own world before"<sup>1</sup>. It seems that a fundamental difference between the art of the first peoples and the art we know today is that while the original people created art, all we do today is to "consume" it<sup>2</sup>.

Collier started a real crusade in order to reform Indian lands. His main efforts aimed to rebuild the tribal land base and to make the remaining Indian lands more governable. The main goal was to prevent Indian lands from being broken up in the future and sold to non-Indians<sup>3</sup>. Meanwhile, *The Indian Reorganization Act* was passed in 1934. Its most important provisions authorized the Secretary of the Interior to approve constitutions and corporate charters for Indian seeking to organize under its provisions.

Within twelve years after the adoption of the *Act*, 161 tribal constitutions were approved under its provisions. For tribes that voted to exclude themselves from the coverage of the *Act* –including those extending the trust period on allotments- its provisions were not applicable<sup>4</sup>.

However, *Morton v. Mancari*, a case decided by the Supreme Court in 1974, deals with the long-time implications of *The Indian Reorganization Act*. This case is particularly significant for the insight it provides into the different values and perspectives involved. *The Indian Reorganization Act* accorded an employment preference for qualified Indians in the Bureau of Indian Affairs. The question in this case is whether this preference is contrary to the anti-discrimination provisions of the *Equal Employment Opportunity Act* of 1972 and whether it is a violation of the *Due Process Clause of the Fifth Amendment*. The language in this case explains the reasons why Congress has enacted "various preferences of the general type here at issue", insisting that the purpose in this situation was to give Indians a greater participation in their own self-government and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life. The same perspective is found when the Court refers to legal history:

"It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined [...] The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests. Congress was united in the belief that *institutional changes* were required"<sup>5</sup>.

The fact that this preference is "similar in kind" to the constitutional requirement that a United States senator, when elected, be "an inhabitant of that state for

<sup>1</sup> John COLLIER, *From Every Zenith*, Sage Books, Denver, 1963, p. 126.

<sup>2</sup> See Friedrich DÜRRENMATT, *Die Schweiz – ein Gefängnis*, Diogenes Verlag, Zürich 1990.

<sup>3</sup> For a comparison between the *Collier Bill* and *The Indian Reorganization Act* see Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, pp. 141-153. It has been said, if the Indians would have in fact understood the implications of Collier's thinking (which included restoration of political sovereignty) they might have been "more violently against him themselves". The essence of Indian destruction, as promoted by the allotment policy, was that too many Indians had adjusted to the idea of individual allotments and did not want to constitute a formal government that "might eventually impinge on their use of their own lands". This a more profound level of analysis, and it shows the effects of a long interaction between two incompatible systems of values.

<sup>4</sup> Such extensions were, nonetheless, made by subsequent executive power.

<sup>5</sup> See *Morton v. Mancari*, in R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 96.

which he shall be chosen" is a statement that illuminates the Supreme Court's intent in this case, as well as its understanding of the true nature of the Indian preference. The Court concludes that the employment preference is not of a racial, but of a political nature, reasonably designed to further the cause of Indian self-government and to make the Bureau of Indian Affairs more responsive to the needs of its constituent groups<sup>1</sup>.

### *The Termination Era*

"Indians were subjected to the most intense pressure to become white. Laws passed by Congress had but one goal: The Anglo-Saxonization of the Indian."

Vine DELORIA

*The Indian Reorganization Act* survived many legislative attacks directed against its "explicit ideological nature". Nonetheless, these attacks show the degree of tolerance towards the authentic values of the Indian world the "larger society" was capable to accept:

"This (*The Indian Reorganization Act*) attempts to set up a state or a nation which is contrary to the intents and purposes of the American Republic, No doubt that the Indians should be helped [...] but in no way should they be set up as a governing power within the United States of America [...] They shall be permitted to have a part in their own affairs as to government in the same way as any domestic organization exists [...] but not to be independent or apart therefrom"<sup>2</sup>.

During the termination era, Congress adopted a statute, commonly known as *Public Law 280*, which operated for affected reservations to transfer the jurisdiction over crimes and civil cause of action previously exercised by federal and tribal courts to state authorities. It transferred jurisdiction to the states over all reservations in California, Minnesota (except the Red Lake Reservation), Nebraska Oregon (except the Warm Spring Reservation) and Wisconsin (except the Menominee Reservation)<sup>3</sup>. All other states were authorized to assume "voluntary complete or partial jurisdiction" over the other Indian reservations within the states<sup>4</sup>.

Over time, the persistent question of the Congress – "Indian tribes" relationship has been the degree of autonomy the Indians retained within their "reserved" lands. While "plenary congressional power" over Indian affairs has been firmly established and reaffirmed in the American jurisprudence, the allocation of power between the tribes and the states absent congressional action remained "less certain".

<sup>1</sup> *Ibidem*, p. 98.

<sup>2</sup> Hearings on S. 2103 before the Committee on Indian Affairs, H. R., 76<sup>th</sup> Cong., 3<sup>rd</sup> Sess., 1940.

<sup>3</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 158.

<sup>4</sup> Alaska was later added to the list of states affected by mandatory provisions of *Public Law 280*, when it was admitted to statehood. For a fascinating insight into the situation of Alaskan Natives under Russian and American rule, see Felix COHEN, *Federal Indian Law*, cit., especially the chapter on Alaskan Natives, pp. 927-964.

This is the field with regard to which *Public Law 280* has so dramatically changed the mentioned relationship. One could base a critique of *Public Law 280* on the extension of state jurisdiction in the absence of tribal consent, but that is not the only aspect that has to be specified. The main devastating effect for the Indians was the lawlessness this law paradoxical created. For instance, in the *United States v. Kagama* case the dispute between the two involved Klamath Indians escalated into homicide because the Bureau of Indian Affairs did not respond to Kagama's claim, but in turn directed the request to Washington. It has been argued that lack of federal assistance proved fatal in this case<sup>1</sup>.

The direct effects of *Public Law 280* were the extension of state criminal jurisdiction and civil judicial jurisdiction over reservation Indians in certain states and the elimination of special federal criminal jurisdiction over reservation areas in the states specifically named in the law. The law substituted state legal authority for federal on all the designated reservations. There was no mention of tribal authority whatsoever.

As a result, tribes in *Public Law 280* states are at a disadvantage compared with tribes elsewhere in the United States. They suffer from "lower levels of federal support and an absence of compensating state support. They are subjects to abuses of power and gaps in legal authority"<sup>2</sup>. It is specially the case of California where tribes have been broken into such "small and heterogeneous groups" that forming "effective justice systems" is very unlikely at the tribal level.

Most of the tribes who lost their federal status did not escape from the burdens of wardship. In a final formulation, the effects of the termination policy can be summarized as follows:

"A terminated tribe may exist to an anthropologist, but not for the purpose of interpreting a statute granting statutory benefits only to recognized tribes. Congress can and has granted some benefits to members of terminated tribes, but only when it has chosen to define the term 'tribe' as including them"<sup>3</sup>.

### *The Self-Determination Era*

"I once explained American Indian legal rights and the consequent demands of the American Indian Movement to a member of the Institute for Policy Studies. His response was: 'That would mean the breakup of the United States.' And he was undoubtedly correct."

Jimmy DURHAM

The root concept for "indigenous people" is the Latin *indigenae*, as opposed to *advenae*, persons who arrived from elsewhere. Indians always believed they had a place on their own, given to them once for ever, a view consistent with their

<sup>1</sup> For a detailed analysis of *Public Law 280* and its effects, see Carol GOLDBERG-AMBROSE, *Planting Tail Feathers: Tribal Survival and Public Law 280*, California University Press, Los Angeles, California, 1997.

<sup>2</sup> *Ibidem*, p. 37.

<sup>3</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 79.

perception about cosmic time. The fundamental question today is: How can the medieval concept of wardship be reconciled with the idea of self-determination of indigenous peoples?

Let's first examine the legislative situation of this era.

Trends to strengthen tribal sovereignty started with the Nixon presidency in 1970. This idea implied stronger tribal control while advocating protection of the Indian land base and resources. The Nixon message "set the legislative agenda for Congress in the field of Indian affairs for the entire decade"<sup>1</sup>. The passing of the *Indian Self-Determination and Education Assistance Act* in 1975 was also aimed at strengthening tribal control over federally funded programs for Indians.

A severe issue of oppression has always been the placement of Indian children into a white environment "for their own good". In this respect, the *Indian Child Welfare Act* of 1978 was designed to reduce the exercise of state jurisdiction in child custody or adoption proceedings involving Indian children who were tribal members or eligible for membership in a tribe. It provided rigorous standards requiring state authorities to attempt "to place an Indian child needing placement in the home of an extended family member, the home of a tribal member, a tribal group home or an Indian home" before the child could be placed with a non-Indian family<sup>2</sup>.

The *Indian Land Consolidation Act* of 1982 sought to remedy some of the vestigial effects of allotment by authorizing tribes to establish plans for land consolidation on heavily allotted reservations.

The concern about the future of Native American values is strongly linked to the dynamics of *Public International Law* with regard to indigenous peoples. The Indian way of life has not merely survived; it is back "at the foundation of a strong identity which has forced itself into the top of the international agenda"<sup>3</sup>. The values of Indian culture are "sought-after models for a world drifting slowly into alienation"<sup>4</sup>.

It is easy to conclude from the exposed considerations on the legacy of conquest that the United States of America are built "on the rock of a fiercely moralistic myth, the right to self-determination and the right to secede from a sovereign who violates the rights of the people who consider themselves a community"<sup>5</sup>. *The Declaration of Independence* is the "textual expression of that primordial feeling"<sup>6</sup>. To which extent this idea is only a myth can be measured against the aspirations for freedom the aboriginal peoples of the Americas had and have. For their primordial feeling has to be considered in the era of self-determination. From this point of view, the strength of tribal resistance has shown that tribal government's authority predates and survives the United States' constitutional system. This basic and simple reality has the following consequence: indigenous populations have always perceived themselves as living within the era of "self-determination". This concept cannot be localized in time, and it is fictitious to the extent to which it has been imposed on the Native American world by its colonizers. It primarily means

<sup>1</sup> See *ibidem*, p. 160.

<sup>2</sup> *Ibidem*, p. 161

<sup>3</sup> See Siegfried WIESSNER, "Rights and Status of Indigenous Peoples. A Global Comparative and International Legal Analysis", *Harvard Human Rights Journal*, no. 12, 1999, pp. 57-128/p. 59.

<sup>4</sup> *Ibidem*; this amazing statement refers to the sacred view about the environment that is found in Indian culture.

<sup>5</sup> Siegfried WIESSNER, "Rights and Status of Indigenous Peoples...cit.", p. 63.

<sup>6</sup> *Ibidem*, p. 6.

a timeless understanding of self-defined dignity, which might well become a concrete reality today.

*The Gaming Regulatory Act* of 1988 created the Indian Gaming Commission to regulate the emerging Indian gaming operations that became a substantial source of tribal revenues. Today, these revenues help change the devastating effects of poverty and illiteracy on the reservations. More than fifty tribes operate more than 100 bingo halls and casinos within the territorial confines of nineteen states, taking six billion dollars a year<sup>1</sup>. Nonetheless, in 1997, of the 554 federally recognized tribes, 306 are defined as "small and needy", without sufficient funds to operate without further federal support.

Indian housing became a priority of the Department of Housing and Urban Development. Still, when President Clinton defines the "federal government-Indian tribes" relationship as a "government to government" relationship, one has to remember Deloria's statement:

"Given the fact that tribal governments are closely controlled by the federal government and obtain a good deal of their administrative overhead from the federal government, this phrase has less substance than people would like to admit"<sup>2</sup>.

There is a long way to go in order to achieve the values of self-determination<sup>3</sup>. But, in the Indian world, a strong motivation to achieve them is constantly there. The cry for self-determination of the Native American today has to be seen within "the resurgence of indigenous communities worldwide, and a thorough analysis of the roots of the legal relationship between the Indian tribes and the country in which they reside", for this will restore the "complex mix of international and domestic prescriptions applicable to the unique story of attempted conquest and survival that constitutes the Indian experience"<sup>4</sup>.

All important change, which turned around the policies of termination, occurred due to the Nixon era. From a conventional point of view, this might be the beginning of the self-determination era. But some of the legislation of this time affected only particular tribes. For example, the Menominee Tribe of Minnesota, the Silez Tribe of Oregon, the Wyandotte, Peoria, Ottawa and Modoc Tribes of Oklahoma, and others were restored to federal recognition and supervision in 1973, 1977, and 1978, respectively, after having been terminated by legislation in

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<sup>1</sup> Although we witness this success, other aspects have to be considered as well. An article published by *The New York Times* shows that Indians are crime victims at a rate above US average: while the average for whites was 49 crimes per 1000 people, for blacks 61 and for Asians 29, the average annual rate at which Indians were victims of crimes was 124 crimes per 1000 people. These statistics show that there is still a lot of prejudice against Indians, especially on the edge of reservations. A study released by the Department of Justice also found that Indians, unlike whites and blacks, were most likely to be the victims of violent crimes committed by members of a race other than their own. See *The New York Times*, February 15, 1999.

<sup>2</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 262.

<sup>3</sup> With the exception of the Nunavut Nation in Canada, for instance, which established its own territory in April 1999, and the Eskimo people in Greenland.

<sup>4</sup> Siegfried WIESSNER, "Rights and Status of Indigenous Peoples...cit.", p. 102. Also see Ch. WILKINSON, J. VOLKSMAN, "Judicial Review of Indian Treaty Abrogation: 'As long as Water Flows, or Grass Grows Upon the Earth' – How Long a Time Is That?", *California Law Review*, no. 63, 1975, p. 601.



the 1950's<sup>1</sup>. In addition, new federal legislation strengthened and reorganized a federal revolving loan fund for Indian and provided federal loan guarantees for private sector loans to support such development. After 1977, the political momentum for a fundamental change in the direction of federal Indian policy became intense. Organized political groups, like Montanans Opposed to Discrimination and the Interstate Congress for Equal Rights and Responsibilities, unsuccessfully lobbied Congress to extinguish Indian rights and force Indian assimilation<sup>2</sup>.

The 1980's marked an important transitional period both for federal Indian policy and for tribal self-sufficiency. Persistent efforts were made during the Reagan administration to reduce the funding of "many federal programs targeted for Indians, to merge such specialized federal Indian programs into more general, often state administered, social services and benefits programs, or to eliminate federal funding altogether"<sup>3</sup>.

However the dynamics of federal management over Indian affairs, a specific and complicated issue is the articulation of special needs and/or rights indigenous peoples have today. These cannot be found in the general prescriptions of what is known as "International Human Rights Law". This is true for codified and for customary law alike. In this context, the role of the United Nations has to be re-examined and redefined in many respects. Efforts in this sense become comprehensible if looking at the 1993 *Draft Declaration on the Rights of Indigenous Peoples* made by the UN Working Group on Indigenous Populations. The proposed *American Declaration on the Rights of Indigenous Peoples* of 1997 contains an important element: it defines that "self-identification as indigenous shall be regarded as a fundamental criterion for determining the peoples to which the provisions of this declaration apply"<sup>4</sup>.

However, the community of states seems to be united so far in the rejection of the option of full sovereignty and political independence for indigenous peoples. But the idea of a Permanent Forum for Indigenous Peoples as envisioned as envisioned by the United Nations Working Group could perhaps lead to their representation as the United Nations sometimes in the future.

The final goal of this metamorphosis has to be the creation of a public order of human dignity<sup>5</sup>. Its manifestations are visible today, and we witness them in many, very paradoxical forms. The most powerful one is the fact that we have sufficient state practice and *opinio iuris* to speak of a customary international law right to land the indigenous peoples traditionally possessed and have managed to keep, as well as a right to a – however formulated – autonomy. Every realistic approach on indigenous peoples' rights has to address this core need<sup>6</sup>. It has finally been said that the United States doctrine of plenary power over Indian affairs, including the

<sup>1</sup> The federal recognition of the Menominees, for instance, has to be seen within the framework provided by the appointment of Ada Deer to head of the Bureau of Indian Affairs. This is, obviously, an aspect of self-determination, a success of self-defined dignity.

<sup>2</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 162.

<sup>3</sup> *Ibidem*.

<sup>4</sup> As quoted by Siegfried WIESSNER, "Rights and Status of Indigenous Peoples...cit.", p. 120 and the following. For an extensive view on the definition of indigenous peoples, as well as the role of international organizations, see the same article.

<sup>5</sup> See Siegfried WIESSNER, "Rights and Status of Indigenous Peoples...cit.".

<sup>6</sup> This approach successfully fights the assumption that has been so well addressed by William Raymond: "The indigenous populations must be always and essentially unreal, a



power of Congress to extinguish, without compensation, Indian title, is violating international human rights<sup>1</sup>.

Revitalization of Indian tribes can be traced back to the 1960ies, when two important pieces of Indian legislation were passed. *Public Law no. 89-635* passed by Congress authorized "any Indian tribe or land with a governing body duly recognized by the Secretary of the Interior" to file suite in federal district court without reference to amount in controversy "for cases arising under the Constitution, law and treaties of the United States"<sup>2</sup>. Also, the here already mentioned *Indian Civil Rights Act* of 1968 required all Indian tribes in exercising their self-government powers to observe and protect "most, but not all, of the guarantees of the Bill of Rights, the fourteenth amendment, and article 1, section 10 of the Constitution"<sup>3</sup>. *Public Law 280* was amended to require tribal consent for all future state acquisitions of jurisdiction over an Indian reservation. The way was opened for state-initiated retrocession to the federal government of jurisdiction previously acquired by the states under *Public Law 280* and the preparation of a "model code" governing courts of Indian offenses became possible<sup>4</sup>.

But beside disputes over land, which are far from being resolved, another phenomenon is going on in the era of self-determination. This phenomenon has been described by Laurie Ann Whitt as "a pattern that began with indigenous lands and resources and which continues now with indigenous knowledge, spiritual and scientific, of the natural world. The land and resource grabbing has not ended, but a new version of cognitive search-and seizure has begun"<sup>5</sup>. Ironically, the promotion of Native culture to tourists and violence and discrimination against Native Americans continues side by side<sup>6</sup>. These unbelievable extremes have been clearly stated by Jimmie Durham, when he writes that "Indian suffering is part of entertainment", and that "as our situation worsened, America loved us all the more"<sup>7</sup>. The most painful manifestations of this phenomenon are visible within the problems posed by access to indigenous sacred knowledge and sacred sites and by the desecration of Native American graves<sup>8</sup>. The fact that all this is possible today rises very serious questions: Are there any moral limits to archeological

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figment of the national imagination. No more or less". See Raymond W. STEDMAN, *Shadows of the Indian: Stereotypes in American Culture*, University of Oklahoma, Norman, 1982.

<sup>1</sup> See Erica Irene DAES, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Chairperson of the Working Group on Indigenous Peoples, *Protection of the Heritage of Indigenous Peoples*, United Nations, New York and Geneva, 1997.

<sup>2</sup> See R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., pp. 157-158.

<sup>3</sup> *Ibidem*, p. 158.

<sup>4</sup> *Ibidem*.

<sup>5</sup> See Laurie Ann WHITT, "Resisting the Politics of Disappearance", in Michael GREEN (ed.), *Issues in Native American Culture Identity*, cit., p. 251.

<sup>6</sup> Aspects of grotesque commercialization can be found in different tourist guides. I will limit my examples here to FODOR's *Affordable Florida Guide* from 1993, where the Miccosukee restaurant is described as an "Everglades tourist attraction". There, one can find "murals with Indian themes", as well as "Indian burgers and Indian tacos".

<sup>7</sup> See Jimmie DURHAM, "Cowboys and ...cit.", p. 435.

<sup>8</sup> It is difficult to write this down, but one really has to address the issues the way they are. A Pawnee burial area near Salina, Kansas, was excavated in the 1930s and the skeletons were displayed as a local tourist attraction until 1989, when Pawnee leaders succeeded in having the graves closed. For more information on this issue, extensively see Erica Irene DAES, *Protection of the Heritage of Indigenous Peoples*, cit., p. 7.

inquiry? National legal systems treat anything found in the soil belonging either to the government, or to the owner of the land. How are we to look at this aspect of legality, and what legitimacy does it have...? In essence, "what other racial group in this country has been forced to endure the sacrilege of watching the remains of relatives ripped from their burial sites and displayed to satisfy a totally unfathomable and morbid sense of scientific curiosity...?"<sup>1</sup>.

It is inescapable to see the difference between true science and these outrageous practices. Indigenous peoples have said it themselves in a very clear manner: all products of the human mind and heart are interrelated, and they flow from the same source: the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world<sup>2</sup>.

But the tragedy of colonization and alienation has led to one certain result: indigenous peoples have been deprived not only of their most precious values, but of their historical age itself. Therefore, whenever we try to understand the root of the conflict, we have to remember that "the profound division in the Americas is not between North and South, but between Indians and settlers"<sup>3</sup>.

### SPECIFIC AMERICAN INDIAN ISSUES

So far, the aim of this paper has been to provide an insight into the influence American Indian Law has had over Indian identity. But its task is also to make understandable how American Indian Law – as an outcome of federal Indian policy – contributed to the erosion of this identity.

Paradoxically enough, questions like "who is an Indian" and "what is an Indian tribe" might become more difficult after studying these issues than they have been before that. However, it has to be specified in the first place that general definitions on identity questions do never suffice, and that the answers have to be sought "primarily in applicable statutes, decisions, opinions or tribal law"<sup>4</sup>. Nonetheless, if – legally speaking – "an Indian is what the law legislatively defines, or judicially determines him to be", the same cannot be said if one wants a deeper insight into Indian identity. The law frustrates this deeper insight – a fact which might have motivated scholars to distinguish between the legal and the ethnological definition on "who an Indian is". The same is true for the Indian tribes.

I can not refrain from mentioning an important nuance here. It has to do with terminology. As Deloria writes, "the word Indian is too broad and it generalizes a definition"<sup>5</sup>. This is rather an "ethnic label" pinned by whites. Deloria further mentions that the appellation "a tribal Indian" is certainly better than simply "traditional". But while the "tribal Indian" did not want to associate with people outside the tribal community, unless forced to do so, Deloria concludes, the "ethnic

<sup>1</sup> See Laurie Ann WHITT, "Resisting the Politics of Disappearance", cit., p. 7.

<sup>2</sup> For an extensive insight into the significance and the value of heritage for indigenous peoples, see Erica Irene DAES, *Protection of the Heritage of Indigenous Peoples*, cit.

<sup>3</sup> See Jimmie DURHAM, "Cowboys and...cit.", p. 433. He ironically presents this statement as an "outrageous idea".

<sup>4</sup> Felix COHEN, *Federal Indian Law*, cit., pp. 4-20.

<sup>5</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 235.

Indian" is a person who, today, looks beyond the reservation to see "both opportunities and dangers the tribe might encounter"<sup>1</sup>.

But further description will not bring a clarification. What is essential to Indian identity is that emotional continuity with their ancestry has to be "seriously considered" and recognized, if one attempts to resolve this complicates question. This perception is related to values like tribal inherent sovereignty, cultural renewal and the fundamental Indian Instinct to live according to ancient ways<sup>2</sup>.

Indian legal status depends not only upon biological, but also upon social factors. Ethnologically, the Indian race may be distinguished from the Caucasian, Negro, Mongolian and other races. If a person "is three fourths Caucasian and one fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race", but legally such a person may "still be an Indian"<sup>3</sup>. When using the term "Indians" legislators deal with a specific group distinguished from "non-Indian" groups by "public opinion". As Cohen emphasizes, this

"public opinion varies so widely that on some reservations it has become common to refer to a person as an Indian although 15 or 16 ancestors back were non-Indians parts of the country; while in other parts of the country [...] a person may be considered a Spanish-American rather than an Indian although his blood is predominantly Indian"<sup>4</sup>.

But leaving aside all these various realities "on the ground", and admitting that "some practical value" may be found in a definition of an "Indian", two criteria are considered. A person is an Indian if some of his ancestors lived in America before discovery and if he or she is considered an Indian by the community in which he/she lives<sup>5</sup>.

As it can (again) be seen here, tribal identity is crucial for the Indian sense of belonging. Still, a person regarded as a member by the tribe might not be so regarded by the Secretary of Interior, who claims the authority to determine membership for purposes of distributing property rights. This is one of the reasons why, within the sphere of federal Indian law, a question of Indian identity can only be answered with reference to the varying purposes for which "it is necessary to answer the question". Anomalies resulted because of the interference between formal tribal roles and federal perceptions on membership issues. "Enrolled members" of an Indian tribe today can include persons who are not racially Indian or others, who are racially Indian, but who do not identify themselves as "members of the Indian community"<sup>6</sup>.

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<sup>1</sup> *Ibidem*.

<sup>2</sup> These are, subjective concepts, and therefore hard to define.

<sup>3</sup> Felix COHEN, *Federal Indian Law*, cit., p. 5.

<sup>4</sup> Generally see *ibidem*, pp. 4-20. These considerations have been extensively quoted here for the concise insight they provide into the issue.

<sup>5</sup> *Ibidem*, p. 6.

<sup>6</sup> See *United States v. Rogers*, decided in 1846, where the Court held that a white man who had voluntarily moved to the Cherokee Nation in the Indian Territory and who had become a member of the tribe "is still a white man, of the white race". It was irrelevant to the Court that this man was adopted into the Indian tribe. It decided that he was going to be prosecuted in federal court, although provisions in the federal jurisdictional statutes excepted intra-Indian crimes from federal court jurisdiction.

Further complications are due to congressional determination of who is an Indian tribe or who is an Indian in recognition of Congress' broad power to regulate Indian affairs<sup>1</sup>. And courts have "historically been deferential" to congressional determination<sup>2</sup>. Additionally, the Supreme Court's recent practice has begun to equate the term "Indian" with "tribal member"<sup>3</sup>.

However, what certainly stays as a conclusion within the federal policy framework is that these concepts are primarily a matter of interpretation. If the term "membership" is used as part of congressional power to control the property of Indian tribes, the congressional definition will govern, while if it is part of a statute designed to strengthen or to protect tribal sovereignty, the tribal definition must be ascendant<sup>4</sup>. The modern congressional trend is to define the term "Indian" broadly to include both formal and informal membership as well as requirements of a "certain degree" of Indian blood<sup>5</sup>.

Another important issue of Indian identity is the definition of "Indian country". This term has been used in many senses. The "most useful" description might be "a country within which federal laws relating to Indians and tribal laws and customs generally are applicable"<sup>6</sup>. Cohen's note specifies that these are lands occupied by Indians to which their title or right of occupancy has not been extinguished.

We can find here a still untouched sense of tribal sovereignty. Meanwhile, the conception that Indian country reflected a situation, "which found its counterpart in International law in the case of newly acquired territories", cannot avoid a main consequence: the very fact that the laws of these territories continued in force until repeated or modified by the new sovereign<sup>7</sup>.

However, the whole "most intricate" problem in the field of Indian law – Indian title – is ignored in this perspective. Imposed by the "single exception of irresistible power" such perspective illustrates the distance between the meaning of a principle and its *de facto* application.

Indian identity becomes a crucial issue in cases like *Employment Division, Department of Human Resources of Oregon v. Smith*, decided in 1990, *Peyote Way of God Church v. Thornburgh*, decided in 1991, *Santa Clara Pueblo v. Martinez* or *United States v. Dion*, decided in 1986. Meanwhile, any Indian case touches – directly or indirectly – the idea of Indian identity, creating legal concepts and enforcing them by later practice.

The question in *Smith* was whether the *Free Exercise Clause of the First Amendment* permits the State of Oregon to include "religious inspired" peyote use within the reach of its general prohibition on use of that drug and whether this permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

*The First Amendment* excludes all government regulation of religious beliefs as such. Respondent in this case were fired from their jobs with a private drug

<sup>1</sup> This is why "justice can be done" to some extent only for "federally recognized tribes", while the non-recognized ones have to fight for their self-defined sense of identity.

<sup>2</sup> See R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., pp. 86-87.

<sup>3</sup> Not to mention that there is a vast difference between what a concept means and how it is interpreted in a programmatic sense.

<sup>4</sup> *Ibidem*, p. 86.

<sup>5</sup> *Ibidem*.

<sup>6</sup> *Ibidem*, p. 13.

<sup>7</sup> Felix COHEN, *Federal Indian Law*, cit., p. 15.

rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both were members. They contended that their religious practices motivation for using peyote "places them beyond the reach of criminal law that is not specifically directed at their religious practice and that is concededly constitutional as applied to those who use the drug for other reasons"<sup>1</sup>. But the Supreme Court's motivation was written from the point of view of the American nation as a "melting pot". It argued that:

"Because we are a cosmopolitan nation made up of people of almost every conceivable religious preference [...] we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order"<sup>2</sup>.

Such rationale implied that the rule "respondent's favor" would open the prospect of constitutionally required religious exemptions from civic obligations of "almost every kind". While invoking that "values have to be protected from government interference", the Court nonetheless did not consider that this particular practice was central to the Indian belief, and that the use of peyote was the very essence of the religious service, since it had the sense of a sacrament. The Indian pantheistic tradition is ignored here; meanwhile, value judgments are made on how "central" a certain practice is for a specific religious belief<sup>3</sup>.

In *Peyote Way Church of God v. Thornburgh*, the court held that federal exemption of members of Native American Church from statutes prohibiting peyote possession effected a "political, rather than racial" classification. Nonetheless, the use of peyote was limited to Native American members who had at least 25% native American ancestry. Since federal exemption was "rationally related" to the preservation of Native American culture, the fact that the non-Indian practitioners of the Peyote Way of Got Church were good-faith believers in using peyote as a sacrament was not relevant to the court's decision.

It was only in 1994 that Congress passed the *American Indian Religious Freedom Act Amendments* legalizing the use of peyote as long as it was "connected to a traditional Indian religious ritual", thereby admitting that peyote use in this context was not of a recreational nature. Finally, it seemed to be understood that peyote was necessary for human access to sacredness through prayer: a way of transcending the "normality" of ordinary life. To use the drug was definitely "central to the religious practice", since it created access to a world that existed as a dimension of internal experience and peace.

The *Peyote Way Church of God v. Thornburgh* case is an essential example for the long-term implications caused by the imposition of one system of values over another. The passing of the *American Indian Religious Freedom Act* of 1978 intended to protect traditional Indian religious activity. But, as shown in *Lyng v. Northwest Indian Cemetery Protective Association* (1988), efforts to invoke the *Act* to limit federal policies adversely affecting Indian Access to religious sites have proven unsuccessful<sup>4</sup>.

<sup>1</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 48.

<sup>2</sup> *Ibidem*, p. 53.

<sup>3</sup> For similar issues see *Frank v. Alaska*, where the Supreme Court of Alaska held that fresh moose meat consumption by the Athabascan Indians – a very important part of the religious funeral feast given in honor of a deceased member – was not "central" to a religious observance.

<sup>4</sup> See "Lyng v. Northwest Cemetery Protective Association", in R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., pp. 68-79.



The Supreme Court in this case decided that the *First Amendment's Free Exercise Clause* does not forbid the government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American tribes in north-western California. It must have been difficult to admit that, in "marked contrast" to western religions, the beliefs systems of Native American do not rely on doctrines, creeds, or dogmas. Unlike in western religions, "universal truths" play no role in Native American faith. Religious ceremonies were essential in Native American society, because their role was not to "explain the natural world or to enlighten individual believers, but to protect and enhance the tribal existence"<sup>1</sup>. Land is essential for Indian religious practice; given its site-specific nature, the practitioner has to be surrounded by undisturbed naturalness. Commentaries or interpretations of the rituals themselves are an absolute violation of the ceremonies; therefore, it was obvious that the proposed construction activities in this case would destroy practitioners' religion and force them to abandon the rituals.

It is painful to mention the most disrespectful actions that have been done and are being done against Indian civilization. This is (mainly but not exclusively) because they involve the sacred value of the dead. It is the most (un)believable situation of the desecration of the dead. But, as it has been said many times in history, the living are here in order to tell the story. And as Walter Echo Hawk, a lawyer with the Native American Rights Found writes:

"It's a real clash between science and religion [...] If you desecrate an Indian grave, you get a Ph.D. But if you desecrate a white grave, you wind up sitting in prison"<sup>2</sup>.

The same ethno-centric logic is found in *Bear Lodge Multiple Use Association v. Babbitt*, decided in 1998. It is hard for anyone embedded into Euro-Christian tradition to comprehend that, in Native American world, a distinction between religion and culture is hardly possible. Particularly in this case, it was difficult to admit the fact that American Indians considered the "Devil's Tower" in Wyoming a sacred site. Indians had a sense of natural theology that established a sense of sacredness in place and tradition.

One has to add that, today, the "exotic nature" of the tribal religions is about all that can attract white tourists to the reservations. As Deloria rightly observes, since the Indian Christians "are not expected to hold church services as a tourist attraction, traditional Indians should not believe that they are required to do so"<sup>3</sup>.

Another relevant case is *Santa Clara Pueblo v. Martinez*. A crucial concept – membership – is involved in this case. From the Indian's point of view, membership in an Indian tribe was not a right created by the Constitution, laws or treaties of the United States: it was an institution that predated discovery, therefore related to tribal inherent sovereignty. Respondent Martinez in this case was a full-blooded member of the Santa Clara Pueblo, residing on the Santa Clara Pueblo reservation in Northern New Mexico. She married a Navajo Indian, with whom she had several children, including respondent Audrey Martinez. Two years before their marriage, the Pueblo passed a membership ordinance according to which the Martinez

<sup>1</sup> See *ibidem*, p. 76.

<sup>2</sup> Cited in Larry FRUHLING, Gannet News Service, Atlanta, Georgia, April 19, 1989.

<sup>3</sup> Vine DELORIA Jr., Clifford M. LYTLE, *The Nations Within...cit.*, p. 254.



children could not be admitted into the Pueblo tribe because their father is not a Santa Claran. Meanwhile, the children could not be accepted into the Navajo tribe, because their mother was a Pueblo.

The legal issues involved are more complicated, however, since they involve the effects of the *Indian Civil Rights Act*. Respondents claimed that such tribal rules discriminate on the basis of sex and ancestry in violation of Title I of the *Act*, which provides that "no Indian tribe in exercising powers of self-government shall deny [...] any person within its jurisdiction the equal protection of its laws". But the court held that Title I does not authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions, thereby not interfering with the tribal rules on membership. Cases like *United States v. Mazurie* and *William v. Lee* are cited here. Indian tribes have long been recognized as possessing the common-law immunity from suit enjoyed by sovereign powers. Although this aspect is subject to the "plenary control" of Congress, one has to consider that Indian nations are exempt from suit "without congressional authorization".

A very interesting case is *United States v. Dion*. It involves essential aspects of Indian identity:

Dion, a member of the Yankton Sioux Tribe, was convicted of shooting four bald eagles on the Yankton Sioux reservation in South Dakota in violation of the *Endangered Species Act*. This act prohibits the hunting of the bald or golden eagle except pursuant to a permit issued by the Secretary of the Interior. On the other hand, members of the Yankton Sioux tribe had a treaty right to hunt eagles within their reservation for noncommercial purposes<sup>1</sup>.

The question in this case was whether the *Eagle Protection and Endangered Species Act* abrogate this treaty right. Although, before the case was decided, Congress' intention to abrogate Indian treaty rights had to be "clear and plain", and although the Act did not contain any explicit reference to Indians, the Court read the statute "as having abrogated that right".

The demand for eagle feathers for Indian religious ceremonies was interpreted as a threat to the continued survival of the golden eagle<sup>2</sup>. "Congress shows to set a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted."<sup>3</sup> We can see from this case how "congressional intent" started to be defined in an implicit sense. The courts' practice supported the modification of Indian rights in a much more substantial way.

The effects of this case have largely destroyed Indian identity. The rights guaranteed to Indians by treaty and statute were often secured in exchange for large cession of land or other rights by the Indians. Many of the treaty and statutory rights involved vested property rights for which compensation must be paid under the *Fifth Amendment*, should the national government abrogate the right. The requirement of a clear and congressional intent to infringe such rights must have given them a sense of security at least concerning the rights retained by negotiated treaties.

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<sup>1</sup> It has to be remembered that hunting and fishing rights are "reserved rights" for the Indians. *Federal Indian Law* has recognized the importance of these activities to traditional Indian cultures. These rights were part of continuing an ancient way of life "after the establishment of the sovereign".

<sup>2</sup> For a contrary view, see the Cherokee's oral history, which contains many stories in which animals worry about the land becoming too crowded with human beings.

<sup>3</sup> R. CLINTON, N. NEWTON, M. PRICE, *American Indian Law*, cit., p. 222.

In the Arapahoe tradition, eagles are seen as messengers,

"transitory between heaven and earth, carrying prayers to the Man Above. This explains the importance of eagles plumage in the Sun Dance regalia, and similarly of the label 'eagles' for the old men who sing religious songs as prayers on behalf of the people"<sup>1</sup>.

*United States v. Dion* allows a deeper insight into the way Indians perceived and worshipped nature. Only such a perspective can give a better sense of the destruction resulted from divergent decisions on Indian issues, both legal and political.

Also some authors have "rhapsodized" about the grandeur of Indian culture and about the sacred sense of nature found in this culture, it is nonetheless necessary to understand the earth from a Native American perspective in order to perceive then impact of the environmental crisis on Native Americans. Their perspective is totally different from then utilitarian view on resources embedded in the Euro-American world. American industrialism "invades the last enclaves of ecologically independent Native America", a silent drama especially if one considers that the concept of progress is foreign to many American Indian cultures. "Ecology and land" are intimately connected with Native American spirituality: the earth is a sacred space, "as provider for the living and as shrine for the dead"<sup>2</sup>. Tuhkutsut, a Nez Perce chief, has said that the earth is part his body: "I belong to the land out of which I came. The earth is my mother"<sup>3</sup>. This sense of worship is especially true for the part of the earth defined as home<sup>4</sup>.

The destruction of the environment is an existential drama for Native American cultures. While other groups of people might have become "accustomed" to pollution, for aboriginal people it means death. Today, they can only remember the times when earth was bountiful, and we were surrounded with the blessings of the Great Mystery, as Luther Standing Bear has said in one of his famous words, transmitted by oral culture.

In this context, one cannot forget the power of religious resistance in tribal societies during the centuries of oppression. As the Romanian philosopher Mircea Eliade states, "the shamanic vision is a universal human experience, but it tends to be an overall unifying force only in tribal societies"<sup>5</sup>.

Going back to the initial question which motivated this study, American Indian Law will reflect Indian identity to the extent to which the shared sense of justice will become reality. Other arguments are no more than sophistry.

<sup>1</sup> *Ibidem*, p. 381.

<sup>2</sup> On the unique problem of Indian remains, see *Mexican v. Circle Bear* (1985), a case dealing with the great respect for human remains in Indian cultures; The *Indian Graves Protection and Repatriation Act* of 1990; Connie HART YELLOWMAN, "Naevahoo'ohhtseme – We are Going Back Home: The Cheyenne Repatriation of Human Remains – A Woman's Perspective", *St. Thomas Law Review*, 9, 1996, p. 103.

<sup>3</sup> D. GRINDE, B. JOHANSEN, *Ecocide of Native America*, cit., p. 31.

<sup>4</sup> For an extensive description of the Native American environmental ethic and environmental philosophy, see D. GRINDE, B. JOHANSEN, "Native Americans: America's First Ecologists?", in *IDEM, Ecocide of Native America*, cit., pp. 23-52.

<sup>5</sup> See Mircea ELIADE, *The Sacred and the Profane*, Harcourt, Inc., Orlando, Florida, 1957, and *IDEM, Shamanism: Archaic Techniques of Ecstasy*, Bollingen Series, New York, 1964. For such an application to the Pueblos, see Alfonso ORTIZ, *The Tewa World*, University of Chicago Press, Chicago, 1969.

Stories of catastrophe and renewal are both found in the Native American legend. But from a contemporary vantage, one story is particularly relevant to the current situation of the American Indian. It comes from the Wappo people of Northern California:

"Long ago there was a great flood which destroyed all the people in the world. Only Coyote survived. When waters subsided, the earth was empty. Coyote thought about it a long time.

The Coyote collected a great bundle of tail feathers from owls, hawks, eagles and buzzards. He journeyed over the whole earth and carefully located the site of each Indian village. Where the dwellings had stood, he planted a feather in the ground and scraped out the dirt around it. The feathers sprouted like trees, and grew up and branched. At least they turned into men and women.

So the world became inhabited with people again"<sup>1</sup>.

If the Indian's perception about cyclic cosmic time is accurate, than Indian renewal will resemble the end of the Wappo story: "He planted feathers sprout out into men and women, who again inhabited the earth". But such regeneration – which painfully resembles the colors of the final scene in Spielberg's *Schindler's List* – would not have been possible if Coyote would not have thought about it "for a long time". This time of reflection is here now. We might still live on the age of discovery.

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<sup>1</sup> As quoted in Carol GOLDBERG-AMBROSE's "Introduction" to IDEM, *Planting Tail Feathers. Tribal Survival and Public Law 280*, Los Angeles University Press, Los Angeles, 1997.